

**PROPOSED PLAN CHANGE 9
HISTORIC HERITAGE AND NATURAL ENVIRONMENT
TO THE HAMILTON CITY PLAN**

THIRD DECISION OF THE HEARING PANEL

**Notable Trees, Significant Natural Areas, and Archaeological and
Cultural Sites**

Date: 03 May 2024

Table of Contents

Executive Summary	3
1 Introduction	4
1.1 Plan Change 9	4
1.2 Appointment of Hearing Panel	4
2 Procedural Matters.....	4
2.1 Notification and Submissions.....	4
2.2 Hearings and Directions.....	5
3 Legal Framework	5
3.1 Relevant Law	6
3.2 Rules having Legal Effect	6
3.3 Relevant Policy and Planning Documents	7
3.4 Te Ture Whaimana	8
4 Scope	8
4.1 Scope Principles	8
4.2 Scope Issues	9
5 Notable Trees	10
5.1 Introduction	10
5.2 Notable Trees and Section 6 RMA.....	12
5.3 The STEM Evaluation Methodology	13
5.4 The Protected Root Zone Methodology.....	15
5.5 Submissions Seeking Additional Notable Trees	16
5.6 Submissions Seeking Removal of an NT from the Schedule	20
5.7 Submissions on Notable Tree Provisions	22
6 Significant Natural Areas	24
6.1 Introduction	24
6.2 Indigenous Biodiversity outside of SNAs	27
6.3 Spatial extent of SNAs.....	30
6.4 Submissions on Objectives, Policies, Rules and other Provisions	41
6.5 PC9 Consistency with NPS-IB	45
7 Archaeological and Cultural Sites	49
7.1 Introduction	49
7.2 WEL: Proposed Network Utilities Exemption.....	53
7.3 Cordyline: Site A127 and Claimed Duplication of Functions.....	56
7.4 Heritage NZ: Amendments, Proposed Additions, and Alert Layer	58
7.5 King: Ngaamurikaitaua (and Others).....	60
7.6 THAWK: Protection of Existing and Unidentified Sites.....	61

7.7	WHG/WHS: Proposed Additions and Alert Layer.....	62
7.8	Housley: Site A12 and Clarification of Rule.....	64
7.9	Other Mana Whenua Issues	65
7.10	Other Submitter Issues	68
8	Statutory Assessment.....	69
9	Decision	69
	Appendix 1 – Glossary of Terms	71
	Appendix 2 – List of Appearances.....	73
	Appendix 3 – Summary of Plan Change Requirements	74
	Appendix 4 – Amended SNA Maps.....	78
	Appendix 5 – PC 9 Provisions.....	82

Executive Summary

1. This is the third decision made by the Hearing Panel (the Panel) with respect to Hamilton City Council's proposed Plan Change 9 – Historic Heritage and Natural Environments (PC9).¹
2. This decision relates to Notable Trees (NTs), Significant Natural Areas (SNAs) and Archaeological and Cultural Sites (ARCS).
3. The Panel's two previous decisions relate to:
 - a) Decision #1 - the removal of uncontested Built Heritage (BH) properties from notified PC9 Schedule 8A; and
 - b) Decision #2 - the removal of Historic Heritage Areas (HHAs) from notified PC9 Schedule 8D no longer pursued by Council or any party.
4. This decision is being made ahead of the remaining substantive decision on BH and HHAs because Notable Trees, Significant Natural Areas, and Archaeological and Cultural Sites raise discrete issues and are separable. The hearing on these three sub-topics was formally closed on 8 April 2024 following the exchange of information relating to WEL's late submission as required by Direction #23 of 11 March 2024.
5. We anticipate issuing one decision relating to BH and HHAs following the completion of the hearing process for those topics.
6. We heard from a number of submitters, experts and counsel throughout the hearing process and wish to express our thanks for the thoughtful, considered and helpful submissions and presentations we received.
7. For the most part we have adopted the Council's recommended provisions for the reasons set out in this decision. We have however made some minor alterations, where necessary, to properly address relevant issues and to better give effect to the relevant policy and planning framework.
8. Attached to this decision are Appendices which contain a glossary of abbreviations used, a list of appearances, a checklist of plan change requirements, and a full set of the PC9 provisions as determined by us.
9. References, and where relevant links, have been provided to key documents referred to in this report to avoid having to append those documents, and to avoid unnecessarily increasing the length of this report. All key documents can also be found on the Council's website.²

¹. In addition, on 27 November 2023 the Panel released its Interim Guidance relating to the Built Heritage assessment methodology.

² <https://hamilton.govt.nz/property-rates-and-building/district-plan/plan-changes/plan-change-9/>.

1 Introduction

1.1 Plan Change 9

1. PC9 seeks to update the identification and protection of sites of historic heritage and natural environments within the operative Hamilton City District Plan (ODP).³ It covers five topic areas - NTs, SNAs, ARCS, HHAs and BH - all of which are matters of national significance under s.6 of the RMA.
2. While the ODP identifies some 122 BH structures, five special character areas, approximately 500 'significant' trees, 59 SNAs and 52 archaeological sites, this was considered an inappropriate and incomplete representation of those values across the City. PC9 was therefore initiated as a partial remedy to that, including by identifying an additional approximately 1050 NTs (on public land), 58 SNAs (extending across both public and private land), and 56 ARCS (on both public and private land). We explain the scope of the plan change, along with other scope issues arising in section 4 below.
3. This decision concerns itself with three aspects of PC9 – NTs, SNAs, and ARCS.

1.2 Appointment of Hearing Panel

4. Hamilton City Council (Council) appointed the Panel to hear submissions and determine PC9.
5. The Panel is made up of the following accredited Resource Management Act 1991 (RMA) hearings commissioners:⁴
 - David Hill (Chairperson);
 - Vicki Morrison-Shaw;
 - Dave Serjeant; and
 - Councillor Ewan Wilson.

2 Procedural Matters

2.1 Notification and Submissions

6. The Council publicly notified PC9 to the ODP on 22 July 2022.
7. The submission period ran until 2 September 2022, at which point 468 submissions had been received, of which 110 related directly to NTs, 142 to SNAs and 54 to ARCS.

³ Themes and Issues Report, Hearing 1: HHAs, SNAs and NTs, 3 March 2023 (Themes and Issues Report), section 3.1.

⁴ Noting three of the four commissioners are independent of the Council.

8. Following the further submission period, which ended on 18 November 2022, 338 further submissions were received.
9. Nine late further submissions were received. The Themes and Issues Report,⁵ prepared for the first hearing (Hearing 1), recommended that the Panel accept all late submissions on the basis that no party would be prejudiced and nor would the process be compromised.⁶ The Panel subsequently confirmed that recommendation.⁷
10. In addition, during Hearing 1 the Council advised that Mr Warnakulasoria's submission regarding a NT at 96 Forest Lake Road, was not an original submission but a further submission without any original submission to which it related. Mr Muldowney, legal counsel for the Council, advised that the Panel could however accept it as a late submission given the risk of prejudice was low (no primary submissions having been made in relation to the tree).⁸ The Council did not object to this approach, and nor did any other party. Accordingly, we accept Mr Warnakulasoria's further submission as a valid submission to PC9.

2.2 Hearings and Directions

11. Hearing 1, which addressed HHAs, SNAs and NTs, was held over nine days from 22 May 2023 to 2 June 2023. In advance of the hearing, and in accordance with our Direction #1,⁹ the Themes and Issues Report and s.42A Report were finalised and circulated. Further directions (24 in total to date) were subsequently issued dealing with procedural and timetabling matters.¹⁰
12. The second hearing was held between 6-15 November 2023 (Hearing 2) and focussed on the historic heritage assessment methodology for BH and HHAs, to ARCS and the National Policy Statement for Indigenous Biodiversity 2022 (NPS-IB).
13. A final (third) hearing on specific identified BH items proposed for scheduling in Appendix 8A of the ODP, and any remaining HHA issues, will be held over three days between 21 and 26 August 2024.

3 Legal Framework

14. In this section we outline the relevant legal framework and the relevant policy and planning documents and address some aspects of those documents. However, we

⁵ Themes and Issues Report, Hearing 1: HHAs, SNAs and NTs, 3 March 2023.

⁶ Themes and Issues Report, section 3.3.

⁷ Direction #3, 30 March 2023.

⁸ Council legal submissions Hearing 1: NTs, 17 May 2023, at [47].

⁹ Direction #1, 2 December 2022.

¹⁰ All of our Directions are available on the Council website: <https://hamilton.govt.nz/property-rates-and-building/district-plan/plan-changes/plan-change-9/>.

leave substantive discussion and assessment of PC9 against these documents to later sections when we are considering the issues arising.

3.1 Relevant Law

15. Counsel for the Council addressed the overarching legal framework for PC9 in his first set of opening legal submissions for Hearing 1.¹¹ In brief he submitted that:
 - a) the purpose of the ODP is to assist HCC to carry out its functions in order to achieve the purpose of the RMA (s.72);
 - b) a council may change its ODP in the manner set out in Schedule 1 to the RMA (s.73);
 - c) any change must be in accordance with the council's functions under s.31 and Part 2 of the RMA; and
 - d) in preparing or changing the ODP, the council must have regard to any proposed regional policy statement (RPS) or proposed regional plan and must give effect to any operative RPS and any relevant national policy statement (NPS) (ss.74 and 75).
16. A checklist of these requirements, drawing on but updating the Environment Court's list in *Colonial Vineyard Ltd v Marlborough District Council*,¹² was attached to those submissions as Attachment B. No party disputed that checklist. We have reviewed and adopted that summary (as **Appendix 2**) for the purposes of this decision.
17. In approaching these requirements we have sought to give effect to higher order policy and plan documents to the extent they are within the scope of PC9 – noting that PC9 is not a full plan review but instead a plan change addressing specific aspects of the natural environment and historic heritage.

3.2 Rules having Legal Effect

18. Section 86B(3) RMA provides that certain rules have immediate legal effect upon notification of a plan or plan change. Those include rules relating to areas of significant indigenous vegetation, significant habitats of indigenous fauna and historic heritage.
19. All of the individual areas, trees and sites identified in the notified PC9 *Schedule 9C – Significant Natural Areas, Schedule 9D – Notable Trees, Schedule 8B – Group 1 Archaeological and Cultural Sites, and Schedule 8C: Group 2 Archaeological and Cultural Sites* have therefore been subject to the associated rules (as have the operative scheduled places) since PC9 was notified (22 July 2022).

¹¹ Council legal submissions Hearing 1: NTs, 17 May 2023, at [6]-[10].

¹² *Colonial Vineyard Ltd v Marlborough District Council* [2014] NZEnvC 55, at [17].

3.3 Relevant Policy and Planning Documents

20. The relevant policy and planning documents were identified in the s.32 Evaluation Report as comprising the following:¹³

Statutory

- a) RMA;
- b) National Planning Standards 2019 (NPStds);
- c) NPS on Urban Development (NPS-UD);
- d) (the then proposed now operative) NPS for Indigenous Biodiversity (NPS-IB);
- e) Te Ture Whaimana o Te Awa o Waikato – Vision and Strategy for the Waikato River (Te Ture Whaimana);
- f) Waikato RPS (WRPS);
- g) Waikato Regional Plans;
- h) Waikato-Tainui Environmental Plan;
- i) Ngaati Hauaa Environmental Management Plan;
- j) Heritage New Zealand Pouhere Taonga Act 2014 (Heritage Act);

Non- statutory

- k) Hamilton Heritage Plan;
 - l) He Pou Manawa Ora: Pillars of Wellbeing; and
 - m) Nature in the City Strategy (2020-2050).
21. The evidence of Mr Ryan, Principal Planner for the Council, also added the Ngaati Tamainupoo Environment Management Plan to the list of relevant statutory documents.
22. For completeness, and while it is perhaps self-evident, we would also add the provisions of the ODP to that list.
23. We also note that after Hearing 1 and prior to Hearing 2 the government released the proposed NPS for Natural Hazard Decision-making for consultation. We did not seek submissions on this proposed NPS as it is at an early stage, and it does not yet have any legal effect.
24. No party appeared to disagree that these documents (listed in paras 20-22 above), either specifically or generally, were relevant considerations. However views differed on the weight to be given to some of the respective documents. We

¹³ s.32 Evaluation Report, section 4.

address that in more detail when considering specific submission issues later in this decision.

3.4 Te Ture Whaimana

25. Te Ture Whaimana is the vision and strategy for the Waikato River, and an important guiding document for the Waikato region. While it forms part of the WRPS, it has that statutory status of an NPS, and prevails over any inconsistent provision within:¹⁴
- a) the WRPS;
 - b) any NPS;
 - c) the New Zealand Coastal Policy Statement; and
 - d) the NPStds.
26. The s.32 Evaluation Report described the overarching purpose of Te Ture Whaimana as “*to restore and protect the health and wellbeing of the Waikato River for future generations*”.¹⁵ That report also stated that PC9 seeks to contribute to the implementation of Te Ture Whaimana by:
- a) recognising and providing for the historic heritage values of, and cultural and spiritual relationship of Waikato River iwi and hapuu with the Waikato River; and
 - b) amending the SNA provisions and enhancing the city’s biodiversity through the restoration of the Waikato River margins and gully systems.

4 Scope

27. During the hearings a number of issues were raised regarding whether specific relief sought in submissions was within or outside the scope of PC9. Unlike some hearing processes, we were not asked to make preliminary determinations or strike out any submissions on scope grounds, and therefore heard any such issues as part of the substantive hearing(s).
28. In this section we briefly summarise the relevant principles relating to scope, before moving on to discuss the particular scope issues raised.

4.1 Scope Principles

29. In approaching the issues of scope, we paid careful attention to the line of relevant case authorities – being those colloquially referred to as *Clearwater*, *Motor*

¹⁴ Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, ss.11 and 12.

¹⁵ s.32 Evaluation Report, section 4.1.4.

*Machinists, Bluewater and Albany North*¹⁶ – and applied the conventional 2-limb test. That is, (in summary), a submission needs to be ‘on’ the plan change, and the plan change must not be appreciably amended without real opportunity for those potentially affected to participate.

30. We are also mindful that while we have the power to strike out a submission/part of a submission under s.41D before, during or after a hearing; strike out is a power which should be exercised sparingly and only in a clear case – particularly given the public participation provisions of the RMA.

4.2 Scope Issues

31. The issues raised in submissions that Council identified as being out of scope comprised requests for:
- a) additional notable tree listings on private land;¹⁷
 - b) physical removal of a tree;¹⁸
 - c) a heritage landscape assessment to protect NTs;¹⁹
 - d) replacement planting;²⁰
 - e) noise provisions;²¹
 - f) protection of non-mapped SNAs;²²
 - g) non-significant indigenous biodiversity; and
 - h) compensation/fee waivers.²³
32. As issues (a), (e), (f) and (g) were contested (at least to some extent) on both scope and merit grounds we address these issues in the relevant NT and SNA sections (5 and 6) below.

¹⁶ Clearwater Resort Ltd v Christchurch City Council [2013] NZHC 1290; Palmerston North City Council v Motor Machinists Ltd [2013] NZHC 1290; Bluehaven Management Limited v Western Bay of Plenty District Council [2016] NZEnvC 191; and Albany North Landowners v Auckland Council [2017] NZHC 138.

¹⁷ As sought by submitters Jane McLeod #30.2, Waikato Historical Society #330.2, Simon Travaglia #431.3, Philip and Sylvia Hart #441.2, and Laura Kellaway #452.29.

¹⁸ As sought by CN and RN Warnakulasoriya.

¹⁹ As sought by the Waikato Heritage Group #427.11.

²⁰ As sought by Earthbrooke Properties #95.1 and #95.2, Zanite Ltd #32.1 and #32.2; Errol Balks #94.1 and #94.2, Robinson Family Trust #236.1 and #236.2, and Fiberygoodness #253.1 and #253.2.

²¹ As sought by the Department of Conservation (DOC) at the hearing in lieu the relief it sought in its submission for a setback #425.30.

²² As sought by DOC #425.3.

²³ For example as sought by Shuan Pattenden #23.1, Dean Parkes #26.1, Hestia Investments Ltd #59.1, Raymond Mudford #98.1-3, Gary and Louise Dela Rue #158.3, Ellen Webb Go Eco #171.3, Jason Oliver #180.2, Michael Oosterbaan #194.2, Ian Williams #312, John Badham #326.3, Roderick Aldridge #328.4, and Glen Boyd #339.1.

33. In terms of the remaining issues, the Council submitted that:²⁴
- a) Physical removal of tree: there is no scope within PC9 to require the physical removal of a listed tree – whether for traffic safety or other reasons. The appropriate process is to raise an issue with the Council’s Transportation Unit, which could, if the Unit agreed, seek a resource consent to have the tree removed.
 - b) Heritage landscape assessment: PC9 does not address landscape heritage (except to a limited extent in the context of HHAs) so relief seeking such assessments, or the listing of such landscapes falls outside the Notable Tree topic.
 - c) Replacement planting: submissions requesting the removal of trees and replacement with other (native) trees are beyond the scope of PC9.
 - d) Compensation and fee waivers: Council does not provide any direct financial assistance to landowners whose land is subject to restrictions in the District Plan and submissions requesting compensation or consent fee waivers for such matters are outside the scope of PC9.

4.2.1.1 Discussion and findings

34. We accept, for the reasons given by the Council (summarised at paragraph 33 above), that there is no scope for the relief sought relating to physical removal of trees, a heritage landscape assessment, replacement planting and compensation and fee waivers. These are matters that sit outside the remit of PC9 and the district plan (refer section 3 above for a summary of the applicable legal framework).
35. While we have discretion under s.41D to formally strike these submission points out, we have elected not to do so, given no such request was made, and given in some cases the merits and the scope were accorded the same submission point number. However, as we have found there is no scope for these matters, we do not consider them further in this decision.

5 Notable Trees

5.1 Introduction

36. In his opening legal submissions for Council, Mr Muldowney summarised the operative NT provisions from Chapter 20 – Natural Environments; referred to therein as “*Significant Trees*” in the context of their contribution to urban amenity. He referenced Objective 20.2.3 and Policies 20.2.3a – 20.2.3f, supported by activity status Rules 20.3h-k, a suite of discretionary activity assessment criteria (Appendix

²⁴ Council legal submissions Hearing 1: NTs, 17 May 2023, at [48]-[50]; Galt, Statement of evidence - NTs, 14 April 2023, at [39]; and Galt, Rebuttal evidence – NTs, 12 May 2023, at [14].

1.3, D3), and Schedule 9D which identifies 81 groups of significant trees (totalling nearly 500 individual trees).

37. Mr Muldowney also noted that Schedule 9D had used the Royal New Zealand Institute of Horticulture (RNZIH) Standard Method of Tree Evaluation, which was now considered unsuitable. The Standard Tree Evaluation Method (STEM) is now the preferred arboricultural industry standard.
38. Consequently, Council engaged Arborlab Ltd to apply STEM to all trees within the public road and reserve areas and to re-evaluate Schedule 9D of the ODP using STEM to confirm the status of the existing Schedule 9D trees. Approximately 1,050 additional trees were identified. All such identified trees were located on public land and reclassified as NTs in the expanded PC9 Schedule 9D. Additional and consequential amendments to the related plan provisions and rule framework were also proposed.
39. The Themes and Issues Report prepared for the hearing summarised the key notified amendments for NTs as follows:²⁵
 - *Revised policies in Chapter 20 relating to notable trees to give effect to existing Objective 20.2.3 and strengthens rules to ensure the health and wellbeing of the tree(s) is protected;*
 - *The amended rules within 20.3 provide greater clarification on the types of works to be permitted with or without a resource consent;*
 - *New rules (20.5.2 and 20.5.3) relating to pruning and maintenance of notable trees and activities in the Protected Root Zone (PRZ) of a notable tree;*
 - *Updates to Appendix 1.1 Definitions and Terms to align with above changes, including the:*
 - *Deletion of the existing definition of the Root Protection Zone and the introduction of a new definition for the PRZ;*
 - *Amendment of 'Protected tree' to reflect the change in terminology used;*
 - *Amendment of 'Pruning, trimming and maintenance of a notable tree' to delete reference to Significant Natural Areas and reflect the change in terminology used;*
 - *Amendment of assessment criteria for NTs (D3) in Appendix 1.3.3 D Natural Character and Open Space to achieve proposed Objective 20.2.3;*
 - *Deletion of RNZIH Standard Method of Evaluation and replacement with the STEM method of Evaluation to Appendix 9 for the identification of NTs;*
 - *Updates to Appendix 9 – Schedule 9D to provide re-assessment of existing listed trees with STEM scores. Addition of new NTs within road berms or reserves, and the inclusion of the PRZ measurement for all notable trees.*
40. The s.42A Report advised that there were 264 individual submission points from 110 individual submitters on NTs. Most submissions related to the removal of individual trees which we address in detail below. Several submissions addressed broader issues such the methodological basis for the scheduling of NTs (STEM) and the identification of the protected root zone (PRZ), as well as the impacts of the scheduling on private property rights on the subject or adjacent properties. These

²⁵ Themes and Issues Report, section 4.4.

submissions were typically also associated with requests for the removal of an individual tree from the Schedule. Some submissions requested the inclusion of additional trees – including on private property.

41. We address these issues starting with the broader methodological concerns and moving to the specific removal and additions requests in the sections that follow. However, before turning to those issues we also briefly address an issue we raised during the hearing regarding NTs and s.6 RMA.

5.2 Notable Trees and Section 6 RMA

42. During Council’s opening legal submissions in the Session 2 hearing, we raised the matter of whether NTs were a s.6 matter. Mr Muldowney’s response was that s.6 could apply if the tree was indigenous, but that otherwise the scheduling of a tree would be responding to s.7(c) on amenity values. Scheduling pursuant to s.6 would afford a higher obligation for recognition and protection than scheduling pursuant to s.7. Mr Muldowney further noted that the link between s.6 and NTs is not as apparent as it is for SNAs or HHAs, both of which are the subject of specific mention in ss.6(c) and (f) respectively.
43. The Panel acknowledges that to determine whether a tree represents s.6 values (being “*significant indigenous vegetation*” or a “*significant habitat of indigenous fauna*”) each tree record would need to be individually examined to establish whether it is both indigenous and significant as vegetation or habitat. That being the case then potentially the tree could be an SNA or part of an SNA and listed in Schedule 9C as well. In terms of our decision on the content of the Schedule, the Panel accepted Mr Muldowney’s advice that we should only be concerned about s.6 relevance if we were inclined to remove a tree from the schedule, at which point some additional scrutiny would be given to the tree’s significance. For example, if an indigenous tree did not reach the 130-point STEM threshold then discretion might be exercised to retain a s.6 tree.
44. Mr Redfern-Hardisty, principal arboricultural consultant at Arborlab, appeared and gave evidence for Council. He made a number of recommendations for the removal of trees from Schedule 9D.²⁶ An examination of those recommendations reveals that only two of those trees were natives, one of which is no longer existing. The remaining tree, a Poohutukawa (T218.21), did not meet the STEM score (see methodology section below) on reassessment. It appears to us that it is unlikely that a single roadside Poohutukawa, amongst a grove of exotic trees (mainly oak species) would qualify under s.6.

²⁶ Redfern-Hardisty, Statement of evidence, 14 April 2023, Attachment 1 – Arborlab Technical Report.

5.2.1.1 Discussion and findings

45. On the basis of the above analysis we find that the relevance of s.6 does not require further consideration in the scheduling of NTs.

5.3 The STEM Evaluation Methodology

46. The STEM tree evaluation methodology was used by Arborlab to identify new NTs within public spaces and to reassess all trees on the existing Schedule 9D. Mr Redfern-Hardisty advised that STEM is now the accepted industry practice for assessments of this nature.²⁷
47. Under the STEM evaluation, there are three main criteria, being Condition (health), Amenity (community benefit) and Notability (distinction). During the hearing, Mr Redfern-Hardisty advised that the Notability criterion was not generally used unless the tree had specific historic connections, for example a plaque noting a historic event, or the tree was notable for its source or rarity. The other criteria assessed the following factors:²⁸
- a) Condition Evaluation: Form, Occurrence, Vigour and Vitality, Function, and Age; and
 - b) Amenity Evaluation: Stature, Visibility, Proximity, Role and Climate.
48. Each of the individual factors within a criterion is given a score out of 27, being 3, 9, 15, 21, or 27 points. Consequently, for each of the Condition and Amenity criteria, the score will range between 15 - 135 points. The Notability criteria can add a further 30 – 270 points to the overall score.
49. A threshold of 130 points for the tree or group of trees to be notable was adopted. Mr Redfern-Hardisty noted that while the exact STEM threshold for NTs will vary from council to council, this threshold was close to the average (131.5). If a tree was part of a group where one tree had scored 130 points, then other trees in the group were only required to score 120 points. Due to the large numbers of trees in Hamilton, the assessment had adopted a methodology to efficiently identify the new trees and groups of trees, which included a visual assessment.²⁹

5.3.1 Submission issues

50. Several submissions addressed the robustness of the STEM methodology, the details of which we have summarised above. While these submissions were typically in relation to a specific tree, we summarise the points made and our findings on them in the following paragraphs.

²⁷ Redfern-Hardisty, Statement of evidence, 14 April 2023, at [16].

²⁸ Redfern-Hardisty, Statement of evidence, 14 April 2023, at [17].

²⁹ Redfern-Hardisty, Statement of evidence, 14 April 2023, at [19]-[20].

- a) The subjectiveness of the STEM methodology – submitters such as #443 Ross Meehan, #137 Jack William Pennington, #448 Richard and Marion Francis, #228 Callum McDougal, #355 Joshua Wood, and #410 Wise Trust were critical of the subjectiveness of the methodology around the Condition and Amenity evaluation. In particular, they identified the absence of a risk assessment for tree fall or branch dropping during extreme weather. There was also the matter of trees rated as ‘poor’ and low scoring on one aspect of a criteria but still being identified as an NT. Similarly, trees having a ‘good’ rating for structure or canopy shape where they were not the ‘best’ examples of that particular tree.
- b) Low scoring - submitter #228 Callum McDougal raised the matter of trees scoring lower than the 130 point threshold still being included as an NT when assessed as part of a group of trees.
- c) Support, lower threshold and fast track - conversely, both submitters #428 Kāinga Ora and #255 the Waikato Tree Trust supported the STEM evaluation. The Waikato Tree Trust also sought that the threshold be lowered to 110 points to be consistent with other local authorities in the region, and that the Council adopt a ‘fast-track’ process for including NTs in the District Plan.

5.3.1.1 Discussion and findings

- 51. Our findings on these specific points are that we accept the Council evidence that STEM is a widely used method of assessment and that the adoption of a threshold which is an average of national thresholds is appropriate. The methodology has an inevitable element of subjectivity, however the evaluation of five discrete factors for each of the Condition and Amenity criteria incorporates sufficient rigour in the process. On the matter of risk that a tree might present to a property owner or the public in general, we find that as a living organism the condition of a tree will change over its life or due to a climate event or other environmental condition. The public should always be able to raise the matter of risk with the Council whereupon an assessment should be undertaken where it is apparent that risk to property or person has increased. However, the listing of an NT should not be precluded, and the delisting of an existing NT should not occur, without good reason. We note that such a (delisting) decision has been made in response to #445 Cameron Gray in relation to the cedar at 1 Blue Cedar Lane.
- 52. In relation to the matter of NTs being scheduled even with a score of less than 130 points, we understand that this only occurs in the circumstances described in paragraph 49 above. We accept that methodology.
- 53. On the process of scheduling trees in the absence of a Schedule 1 process as suggested by the Waikato Tree Trust submission, we agree with the Council’s position that a Schedule 1 process is necessary in order to ensure natural justice

occurs.³⁰ The notification of changes to the NT schedule can come with immediate legal effect which addresses the Waikato Tree Trust concern of the interim protection of NTs and any works affecting them.

5.4 The Protected Root Zone Methodology

54. PC9 introduces rules in relation to the PRZ. The PRZ is not new. It is provided for in the ODP (albeit specified differently as the Root Protection Zone - RPZ) and is a mechanism widely adopted by territorial authorities in district plans and the New Zealand arboriculture industry.³¹ It recognises that activities within the root zone can adversely affect the health and stability of a tree and, on that basis, constraints on certain activities that would cause damage to the roots are justified.
55. The PRZ is defined in a different way to the ODP's RPZ. Whereas the RPZ was determined by the dripline of the tree, the PRZ is calculated as 12x the diameter of the tree at 1.4m above the ground. A more complicated formula is required for multiple stem trees. The PRZ for each tree is shown on the planning maps.
56. Mr Redfern-Hardisty's advice is that when considering development near trees, the PRZ is a generalised area where root growth is likely and that the calculation method for the PRZ through trunk size provides a more accurate interpretation of root growth compared to the dripline approach.³²
57. The PRZ frequently extends into a neighbouring property. This is not a new phenomenon, however, the introduction of many additional trees on public land into Schedule 9D has generated a large number of submissions – particularly from adjoining private property owners concerned about the PRZ.

5.4.1 Submissions on the PRZ

58. Many submissions seek the removal or reduction of the PRZ or the tree to which the PRZ relates, not because the tree is necessarily opposed as a NT, but due to the PRZ created by it. Submissions expressed concern about the constraints on private property rights and the ability to further develop their properties. There was also some focus on the extent of existing impermeable surfaces not appearing to affect the health of adjacent trees and that restrictions on impermeable surfaces were therefore not necessary.
59. There were also submissions on the PRZ methodology, the key elements of which methodology we have summarised above. The Arborlab memo supporting the assessments advises that this methodology has been widely adopted in the New

³⁰ s.42A Report – HHAs, SNAs and NTs, section 5.4.3.

³¹ Gault, Statement of evidence, 14 April 2023, at [26]-[28].

³² s.42A Report – HHAs, SNAs and NTs, section 5.4.5.

Zealand arboricultural industry and it is likely to become the standard for the New Zealand Arboricultural Association.³³

60. Mr Redfern-Hardisty addressed the PRZ issues raised in submissions in his additional technical assessment.³⁴ He did not recommend any reduction or removal of the PRZ in any case, nor any removal of the associated NT from Schedule 9D. The Council has however recognised the constraints placed on private property by the PRZ and has accordingly recommended some amendments to the rules which we address in a later section.

5.4.1.1 Discussion and findings

61. We accept that the adoption of the PRZ is appropriate, being commonly used in New Zealand. We also acknowledge that for many property owners the existence of the PRZ, from a NT on their own property or a neighbouring one, including public land, may impose a greater constraint than the presence of the NT itself. However, and we state the obvious, the roots are an integral part of the tree, and must be protected. As many submitters pointed out, trees' root structures vary significantly, and the presence of site development will affect their spread and depth. The PRZ for each tree is mapped on the planning maps, assuming a regular radius. When property owners and developers seek to develop within the PRZ it is likely that discussion with the Council and arborist advice will be necessary to determine whether the mapped extent reflects the actual extent on the ground. As with many district plan matters requiring interpretation, a practical approach is needed by all parties.

5.5 Submissions Seeking Additional Notable Trees

62. As noted, new NTs proposed by PC9 were limited to trees within the road reserve and other public reserve areas. No new NTs on private land were included. The s.42A Report contained advice³⁵, in response to Submission #441 by PR & SP Hart, that:

it is not recommended to schedule notable trees where they are located on private land under PC9, as the entire focus of the PC9 preparatory work for the notable trees topic were trees located on public land. Consideration of potential notable trees on private land can be undertaken within a future process.

Ms Laura Galt, Intermediate Planner for the Council, confirmed that there was a clear direction to staff from the Council that only trees on public land be considered for inclusion in PC9, despite the Arborlab review including some trees on private land.

³³ s.32 Report, Appendix 11 – Notable Trees, Part 1 p.4.

³⁴ Redfern-Hardisty, Statement of evidence, 14 April 2023, Attachment 1, pp.31-36.

³⁵ Planning Report for Hearing Session 1, 6 April 2023, at [5.4.6].

63. The PC9 public notice did not provide any information that limited the scope of the plan change to trees on public land, with the only relevant descriptive statement being that *“The purpose of the plan change is for the identification and protection of historic heritage or natural environments as defined by the RMA”*.
64. In relation to NTs the singular objective of Chapter 20.2 on NTs is that *“The values of Notable Trees are protected and maintained”*. Further the explanatory text following this objective states:

Much of Hamilton’s distinctive character is derived from its trees, which are an integral part of the City’s amenity and identity. Notable trees can be individual specimens or groups of trees on public or private properties, as well as significant street trees.” [our emphasis]

While the words *“public or private properties”* were added to this explanation through PC9, those words are used elsewhere in the ODP, since the ODP currently contains NTs on both public and private land.

65. From a practical and procedural point of view we note that the Arborlab STEM review was only completed in June 2022 and that the Council approval of PC9, and the subsequent public notice was completed by 22 July 2022. The inclusion of NTs on private land in PC9 would have required significant time for consultation and we are aware of the stringent timeframes that were necessitated by the relationship of PC9 with Plan Change 12 – Enabling Housing Supply - the intensive residential housing plan change the Council was required to notify in August 2022.³⁶ Extensive consultation on NTs on private land could not have been completed within that time frame.
66. Submissions seeking additional NTs, irrespective of whether they are on public or private land require assessment by an independent arborist to confirm that the threshold is met and consultation with potentially affected parties. While the scheduling of a built or natural heritage item would typically involve consultation with just the landowner on which the item is situated, the extension of the PRZ beyond the property boundary necessarily requires consultation with owners of land adjacent to any proposed scheduled tree. This has not occurred for any of the trees which are the subject of submissions seeking additional NTs.
67. The s.42A Report listed the following trees or groups of trees that were identified in one or more submission requesting inclusion in Schedule 9D:³⁷
- *Group of trees located on Swarbrick Park*
 - *Old Mill Street oaks located on Old Mill Road and Commerce Street*

³⁶ RMA, s.80F.

³⁷ s.42A Report – HHAs, SNAs and NTs, section 5.4.6. These trees were supported by one or more submitters including: #30 Jane McLeod, #75 Christine Barbara Doube, #125 Ewan Opie, #431 Simon Travaglia, #330 Waikato Historical Society, #452 Laura Liane Kellaway, #427 Waikato Heritage Group, and #441 Philip Rupert and Sylvia Phyllis Hart.

- *Oak trees at the corner of Seddon and Mill Street*
- *Group of street trees located in Hayes Paddock*
- *The trees identified in the Burstall 1970 Report*
- *Memorial trees around Hockin House*
- *Historic trees on Old Mill Street and corner Seddon Road and Mill Street*
- *Camellia at 10 Taniwha Street*
- *Historic landscape and historic trees within Historic Heritage Areas, in particular in Frankton East area and Marire Street, Parr Street and Taniwha Street Historic Heritage Area*
- *Trees at 64 Knighton Road*
- *Tree in front of 9 Masters Avenue and all the trees along Masters Avenue*
- *Trees located on Mansel Ave and Masters Ave*
- *London Plane trees along Ruakura Road*
- *Inclusion of various historic trees on private land*

68. We note that this list includes a mixture of trees on public and private land. Arborlab undertook an assessment of all of these trees and concluded that most did not reach the STEM threshold for inclusion. The Arborlab evidence noted that some of these trees were already included in Appendix 9D. In particular:
- a) Waikato Heritage Group (WHG) submission #427.74 sought the inclusion of a group of NTs on Swarbrick Park. The Arborlab response was that two of these trees, a pin oak T170 (174 STEM points) and a lime tree T171 (162 STEM points) were already included in Schedule 9D.³⁸
 - b) WHG Submission #427.82 sought that two trees listed in the Burstall 1970 Waikato report be included in Appendix 9D. The Burstall report was reviewed and the listed trees (English Beech T14.2 and Flowering Red Gum T22) were both assessed as having 210 STEM points and are already included in Appendix 9D.
69. For the remainder of the trees for which scheduling was sought we note that the Arborlab review did not score the trees above the STEM threshold and that the submissions in support did not provide any independent arborist assessment. The two exceptions to this are submissions #452.29 by Laura Kellaway and #427.74 by WHG on the inclusion of the very old camellia at 10 Taniwha Street and additional trees within Swarbrick Park associated with the Frankton Railway HHA.
70. Mr John Adam, landscape historian and Manager of Endangered Gardens, provided expert evidence for WHG which included a STEM assessment. We accept that Mr Adam has the qualifications and experience to undertake this assessment. Mr Adam

³⁸ Note that the Arborlab report referred to the pin oak as T179, which we have amended.

attended the relevant expert conferencing on 17 March 2023, but no outcomes are recorded in relation to the specifics of these submissions and Mr Adam advised that he had not discussed them further with Mr Redfern-Hardisty.

71. Mr Adam scored the camellia at 10 Taniwha Street at 180 points on the Condition and Amenity criteria combined, adding a further 99 points for the Notability criterion. Mr Redfern-Hardisty concluded that for Condition and Amenity the camellia did not score more than the 130 point threshold required for scheduling, and it would need to rely on an expert historical assessment to get over the threshold.
72. In response to a question from the Panel, Mr Adam affirmed that the owners of 10 Taniwha Street were fully aware of the implications of scheduling the tree in terms of constraints on the use and development of the property. However, we did not receive written confirmation of this from the owners. Further, we did not have evidence of whether the PRZ might extend into a neighbouring property.
73. In his presentation to the hearing, Mr Adam discussed the significance of the additional trees within Swarbrick Park associated with the Frankton Railway HHA. Ms Kellaway also emphasised the significance of heritage landscapes, where notable trees and built heritage are considered together. Mr Adam's STEM e evaluation for the group of trees was 285, including the Notability criterion. While Mr Adam understood the trees to be within the HHA, it is evident from the planning maps that this 'avenue' of trees is located just outside the HHA, but within Swarbrick Park.

5.5.1.1 Discussion and findings

74. In terms of the issue of scope, we consider the matter is not as clear cut as the Council's submissions would suggest. While the Council's intention was that PC9 would be limited to including trees only on public land, the public notice and explanatory material within the plan change did not make that crystal clear. The fact that the ODP includes some existing NTs on private land may, at least without some clear direction to the contrary, suggest that additional trees on private land could be added. Accordingly, it is arguable that such submissions are "on" the plan change.
75. However, and as we noted in section 4 above, to be within scope submissions must also satisfy the second *Clearwater* limb – that is, provisions must not be appreciably amended without a real opportunity to participate by potentially affected parties. Here, while the requests for additional listings were included in primary submissions, there was no consultation undertaken with affected landowners (those whose land the tree is located on, and any adjoining property owners affected by the PRZ). Nor, in our view, did the further submission period (some 10 working days) provide a sufficient opportunity for those landowners to effectively participate, given the likely need for arboricultural and planning advice to understand both the merits and implications of any such listing. Accordingly, we

find that there is no scope to accept submissions requesting the listing of additional trees on private property.

76. However, even had there been scope, we are not persuaded there is merit.
77. In terms of the Taniwha Street and Swarbrick Park submissions, we find that while each submission presents a case for scheduling, both fall short of the information we need for that to happen:
 - a) The camellia at 10 Taniwha Street requires written support of the owner and more coherent historical information to support the Notability criterion score.
 - b) The avenue of trees in Swarbrick Park are situated within public reserve, thus having some existing protection for that reason. It is possible that additional protection through inclusion in the adjacent Frankton Railway Village HHA or by specific scheduling as a group of historic trees is warranted but specific information on individual trees, needed to support a group listing, and more historical background is needed to support the Notability criterion score.
78. All other submissions for the addition of NTs to Schedule 9D are rejected due to the lack of expert assessment demonstrating their merit for inclusion.
79. We understand from the Council that the composition of the NT schedule will be subject to review and further additions through future plan changes, and we encourage parties seeking such listings to provide further information to and participate in those processes.

5.6 Submissions Seeking Removal of an NT from the Schedule

80. There were 45 submissions seeking the removal of a NT or NTs from the Schedule. Mr Redfern-Hardisty advised that each of the trees was reviewed, and a further report produced.³⁹ This resulted in 59 trees being removed from the Schedule (responding to 16 submissions) for reasons including not meeting the 130-point threshold on reassessment, the presence of power lines presenting a safety issue, and/or decline in health of the tree.
81. The remaining 29 submissions were not supported by Mr Redfern-Hardisty, who maintained his original assessment that the tree(s) met the 130-point threshold. Several of the submitters attended the hearing however none of the submitters provided an independent arboricultural assessment of the relevant trees.

5.6.1.1 Discussion and findings

82. In the absence of any independent arboricultural assessment supporting the submissions seeking NT removal, we rely on Mr Redfern-Hardisty's assessment and

³⁹ Redfern-Hardisty, Statement of evidence, 14 April 2023, Attachment 1, p.3.

evidence in support of their retention. We provide further comment on three of the submissions seeking removal in the following paragraphs.

83. D and B Yzendoorn submission #301 sought the removal of several NTs under the collective number T172. These trees are located on a public reserve adjacent to land owned by the submitters. Jacob Robb, a resource management planner at Blue Wallace Surveyors Ltd, provided planning evidence in support of the submission. While not contesting the scheduling of the trees, as this was not within his area of expertise, Mr Robb advised that the overlapping PRZ of the group of trees extended over most of the Yzendoorn property and so would create a significant impediment to the redevelopment of the site. Mr Robb agreed that the changes recommended by Ms Galt for redevelopment of existing permeable areas was helpful and sought the reference to “envelope” in Rule 20.3(w) be removed. Ms Galt agreed with the latter change and also Mr Robb’s advice that the trees had not been correctly plotted on the planning maps and should be checked. We accept the agreements reached in the above discussion.
84. Mr Cameron Gray attended the hearing in support of his submission (#445) seeking removal of a blue cedar tree from the schedule. The tree is an existing NT in the ODP. Mr Gray provided photographic evidence of the damage that falling branches and debris from the tree had caused to his house and other parts of the property. Mr Redfern-Hardisty’s reassessment of the tree noted “*multiple sites of historic branch failure that are of significant size*”, that these failures are “*large enough that they pose a risk to both people and property*” and “*(b)ranch failure is a common occurrence*” in the species. Mr Redfern-Hardisty’s reassessment was that the status of the tree be placed on hold pending further assessment. Our finding is that we were sufficiently convinced by Mr Gray’s evidence and Mr Redfern-Hardisty’s arboricultural risk assessment (and our own site visit) that the tree should be removed from Schedule 9D.
85. Mr Warnakulasoria attended the hearing in support of his submission seeking that the oak tree (T167) in the road reserve outside his property in Forest Lake Road be removed from Schedule 9D as well as physically removed. We addressed the lack of scope for physical removal in section 4 above.
86. In support of his request for removal from the Schedule, Mr Warnakulasoria presented detailed evidence on the safety implications for vehicles entering the road from his property due to the tree blocking visibility to the west along Forest Lake Road. We agree that the evidence demonstrates that additional care needs to be taken for this manoeuvre. However, we accept the Council’s evidence⁴⁰ that the appropriate course of action is for the Council Transport Unit to consider the safety aspects and if it is decided that the tree should be physically removed, consent can be sought and obtained. Consequently, we find that the tree should remain in

⁴⁰ Galt, Rebuttal evidence - NTs, 12 May 2023, at [14].

Schedule 9D. Our discussion here can also be applied to submitter #397 CK Reddy who raised similar safety concerns regarding a tree adjoining his property on Grey Street. We find that that tree should also remain in Schedule 9D.

5.7 Submissions on Notable Tree Provisions

87. The NT provisions are contained in Chapter 20 and include an objective and related policies (20.2.4) for the protection and maintenance of NTs. These provisions are achieved by rules establishing activity status for emergency works, the pruning and maintenance of NTs, and earthworks and other activities within the PRZ (20.3(s) to (x)). The activity status for some activities is determined by compliance with specific standards in 20.5.2 (pruning and maintenance), 20.5.3 (activities in the PRZ) and 20.5.4 (emergency works). Appendix 1.3 contains matters of discretion and assessment criteria are set out in 20.6.
88. Many submissions seek changes to the provisions in Chapter 20 particularly:
 - a) objectives and policies;
 - b) activity status for works in the PRZ;
 - c) standards on impervious surface or ground level alteration within the PRZ;
 - d) provisions on building and structures and storage of materials within the PRZ;
 - e) standards for pruning and maintenance of NTs;
 - f) definitions and terminology; and
 - g) assessment criteria.
89. Few, if any, of the small number of submitters who appeared at the hearing on NT matters addressed us about the above amendments. Consequently, we have relied on the content of the written submissions and the response to them by Mr Redfern-Hardisty as to arboricultural matters, Ms Galt as to planning matters respectively and the submissions of Mr Muldowney in relation to legal issues.
90. We agree with the common submission point,⁴¹ that under PC9 as notified, a resource consent process could be required for routine maintenance activities which could potentially be more onerous than the proposed activity itself - for example the replacement of a parking areas or driveway within the PRZ. Ms Galt responded to many of the submissions by acknowledging that the clarity of the rules for various activities could be improved and that additional permitted activity provisions for activities that were unlikely to adversely affect an NT were appropriate.
91. The s.42A Report authors produced a revised version of Chapter 20 which contained all of Ms Galt's recommendations for amendments. Reviewing this version we note the following key amendments responding to the submissions:

⁴¹ For example Mr Phillip Curnow, submission #109.

- a) the definition of PRZ has been amended to state:

Protected Root Zone: Means the minimum radius, from the centre of the tree trunk to ensure a tree's health and stability is safeguarded, as calculated using the following protocols:

- *For single trunk trees – the trunk diameter multiplied by 12 at 1.4m above the ground, or at the narrowest point below any fork/multiple stem development;*
 - *For multiple stem trees – at ground level multiply the square root of the combined stems by a factor or[sic] 12.*
- b) the identification of biosecurity risk as a reason for emergency works or removal of an NT;
- c) the routine maintenance and repair of tracks, footpaths and gardens etc., including the like-for-like replacement of existing impervious surfaces is a permitted activity subject to compliance with standards;
- d) clarification that “*new and permanent*” storage of materials, vehicles, plant or equipment requires a resource consent as a restricted discretionary activity. We observe here that practically, the parking of a car would not be considered the storage of a vehicle, but long-term positioning of stationery vehicles might; and
- e) clarification as to the activity status of planting of shrubs, plants and trees within the PRZ.

5.7.1.1 Discussion and findings

92. We accept the revisions recommended by Ms Galt (as summarised in paragraph 91 above).
93. We find that the definition of Protected Root Zone could benefit from some further redrafting, albeit that the specific parameters of the definition are accepted. We suggest the following amendments to clearly split the definition into provisions for single and multi-stem trees and to better reflect the formula provided by Mr Redfern-Hardisty.⁴² We have examined this formula and find that it fairly approximates the likely spread of roots in relation to various species of trees.

Protected Root Zone: Means the minimum radius to ensure a tree's health and stability is safeguarded, measured from the centre of the tree trunk and calculated using the following methods to determine trunk diameter and the minimum radius:

- *For a tree with a single trunk at 1.4m above ground – use the trunk diameter measured at 1.4m above the ground;*
- *For a tree with a fork/multiple stems at 1.4m – use the trunk diameter at the narrowest point below any fork/multiple stem development;*

⁴² The formula from the Arborlab report is:

b. for multiple stems at ground level. Multiply the square root of the combined (stems)

DBH² by a factor of 12 or DBH = $\sqrt{(DBH)^2 + (DBH)^2 + (DBH)^2} \times 12$

- For a tree with multiple stems at ground level – use the trunk diameter as determined by calculating the square of the diameter of each individual stem at 1.4m above ground and then calculating the square root of the summation of these squares;

multiply the trunk diameter by 12.

94. We consider that with those amendments the provisions are now sufficiently clear and appropriate to manage effects of activities on NTs and their PRZs.

6 Significant Natural Areas

6.1 Introduction

95. In his opening legal submissions for this sub-topic, Mr Muldowney noted that the ODP provisions for SNAs were based on a mapping exercise undertaken in 2010, which identified 59 SNAs within the City. This has subsequently been recognised as being seriously inadequate, particularly regarding the gully and river networks and more recent judicial concerns expressed regarding the s.6(c) RMA requirement for the protection of the habitat of the nationally critical long-tailed bat.⁴³
96. Mr Muldowney referred to the relevant ODP SNA provisions (Objective 20.2.1 and its 16 related policies 20.2.1(a)-(p), activity status Rule 20.3(a)-(g), and Schedule 9C).
97. Council engaged 4Sight Consulting to review the 59 operative SNAs and to map other areas of the city that met the threshold of s.6 RMA and the SNA evaluation criteria set out in Appendix 5 (APP5) of the WRPS. This resulted in two spatial datasets being created: Floristic SNAs (fSNA) and Corridor / indigenous fauna habitat SNAs (cSNA). In total 65 fSNAs and 52 cSNAs were identified.⁴⁴
98. The 4Sight Consulting report defines these two SNA datasets as follows:⁴⁵

‘Floristic SNA’ (fSNA): Distinct areas of wetland or terrestrial vegetation communities dominated by naturally occurring indigenous plant communities or where naturally occurring indigenous vegetation define the primary aspects of the natural area which makes it significant in terms of Section 6c of the RMA (for example, the area meets criteria 4, 5, 6 or 10).

‘Corridor/indigenous fauna habitat SNA’ (cSNA): Areas that are able to be delineated by topographical or vegetation features (such as a gully systems, which can be dominated by exotic vegetation or restoration planting), which:

- *Provides significant fauna habitats (including stepping stone or corridor habitats), including regularly used habitats by nationally At Risk or Threatened indigenous fauna species (for example, the area meets criterion 3); or*
- *Provides ecological buffering to a regionally or nationally important SNA, (for example, the area meets criteria 7, 8, 9,11).*

⁴³ Council legal submissions, Hearing 1: SNAs, 19 May 2023, at [3]-[4].

⁴⁴ PC9 Schedule 9C.

⁴⁵ s.32 Evaluation Report, Appendix 12 SNAs – SNAs of Hamilton City District: Terrestrial and Wetland Ecosystems, 4Sight Consulting, June 2022. Appendix 12 PC9 p.4.

99. Dr Hannah Mueller, Principal Ecologist and Director Phoenix Ecology, provided evidence for the Council. She described how PC9 addresses the 'gap' between the ODP based indigenous vegetation based SNAs and other vegetation areas providing significant habitat by extending the SNAs to include other vegetation areas (predominantly in gullies and along the Waikato River) that are habitat for several threatened and/or regionally uncommon indigenous faunal species, notably 'Nationally Critical' long-tailed bats (*Chalinolobus tuberculata*).⁴⁶
100. The 65 fSNAs comprise 122ha, of which Horseshoe Lake (35ha), River Road North Gully (7ha) and Lake Rotokaeo (7ha) make up approximately 40%, with the remaining 62 fSNAs making up the balance 73ha. Consequently, the overall picture is of many small remnant floristic SNA areas, as shown on the planning maps, spread throughout the city. We note that the fSNAs dataset was based largely on the original ODP dataset from 2010.
101. The cSNA dataset has several differences to the fSNA dataset. As noted above in relation to Dr Mueller's evidence, it is largely new, apart from some ODP fSNAs that were converted to cSNAs. The cSNAs also cover a much greater area (660ha), comprising largely the river gullies of the Waikato River corridor 64 (c64), at 137ha and its tributaries (several larger than 20ha) and Lake Rotorua at 77ha. At a city-wide scale it is the cSNAs that are much more evident, again a feature shown on the planning maps. The linear nature of the cSNAs means that that they are likely to apply to land within many properties, including private land (for example c64 the Waikato River, c26 the Katipaki Gully or c54 Tauhara Park - Kirikiriroa Stream). The topographic features of the cSNAs, responding to the definitional criteria stated above, also meant that they extend not just along the main stem of the Waikato River and its tributaries, but into many minor gullies at the upper end of the river sub-catchments. We note that the large size of the cSNA additions and the new protection given to these areas by their recognition as SNAs, is the key driver of many submissions.
102. PC9 included the fSNA and cSNA in a new Schedule 9C along with amended and additional policy, activity status, standard, and definition provisions.⁴⁷ The Themes and Issues Report prepared for the hearing summarised the key notified changes as follows:⁴⁸
 - *Revised policies in Chapter 20 relating to SNA management to change the focus from an absolute 'avoidance' approach to an effects management approach that focuses on avoiding adverse effects on key ecological values and functions (loss of ecosystem function, fragmentation) to protect SNAs;*

⁴⁶ Mueller, Statement of evidence, 14 April 2023, at [17].

⁴⁷ Excluding the Peacocke Structure Plan Area which was updated via Plan Change 5 - Peacocke Structure Plan.

⁴⁸ Themes and Issues Report, section 4.3.

- *Revised policies also recognise activities that are beneficial for SNAs and/or have a functional or operational need to exist in a SNA, and provide greater support to enable restoration activities;*
- *Amended rules within Rule 20.3 and 20.5 provide permitted activity pathways for a specific set of activities that have economic, social, environmental and cultural benefits (specifically restoration and enhancement works, maintenance of infrastructure, public walkways and cycleways, customary activities) where permitted thresholds are met;*
- *Amended rules within Rule 20.3 provide consenting pathways for activities that have a functional or operational need to be in SNA or may provide wider benefits while protecting SNAs (e.g. walkways to connect public to the Waikato River);*
- *A slightly different policy and rule framework that differentiates between floristic SNA (fSNA) and corridor SNA (cSNA) is applied, to reflect that their different ecological functions and values warrant different approaches to managing impacts on the values of the SNA in certain circumstances;*
- *Introduction of new rules in Chapter 25.2 which manage earthworks in dripline of a tree where trunk is in SNA and for the pruning of canopy of tree overhanging the boundary of a SNA;*
- *Amendments to Policy 25.6.2.1a to include consideration of light spill and glare having an impact on indigenous fauna in a SNA;*
- *Updates to Appendix 1.1 Definitions and Terms to align with above changes, including definitions of ‘biodiversity offset’, ‘biodiversity compensation’, ‘restoration’ in relation to SNA, ‘pest control’, ‘vegetation trimming and maintenance’ and ‘vegetation removal’;*
- *Addition of four new assessment criteria for SNA to Appendix 1.3.3 D to ensure new concepts in the SNA policies (e.g. biodiversity offsetting or compensation) are considered, and to reflect the new pathways for infrastructure and public walkways/cycleways that are provided for in SNA in Chapter 20; and*
- *Updates to Appendix 9 – Schedule 9C with revised list of SNA, including reference to the values which make each SNA significant and the classification of SNA.*

103. Ms Galt’s primary evidence provided further information on the broader Council strategies to address biodiversity across the city with the focus being on restoring native vegetation. This included the Nature in the City Strategy, which seeks to *“achieve 10% native vegetation cover in Kirikiriroa/Hamilton by 2050”*.⁴⁹

104. Ms Galt advised that currently Hamilton has less than 2% of native vegetation cover remaining. Ms Galt considered that the proposed wording of policies 20.2.1i and 20.2.1l recognised that a *“large portion of the 10% coverage would occur in SNAs”*.⁵⁰ She advised that the Nature in the City Strategy identifies and prioritises a number of initiatives outside the District Plan (and funded under the Council’s Long Term Plan) to achieve the above goal, including:⁵¹

⁴⁹ Galt, Statement of evidence – SNAs, 14 April 2023, at [37].

⁵⁰ Galt, Statement of evidence – SNAs, 14 April 2023, at [37]-[38].

⁵¹ Galt, Statement of evidence – SNAs, 14 April 2023, at [39].

- a) *Restoring gully systems through creating access paths, undertaking pest control and native revegetation and maintenance;*
- b) *Establishing a citywide monitoring and reporting programme;*
- c) *An integrated approach to ecological restoration, including working with neighbouring councils; and*
- d) *Supporting and enabling our community to care for nature.*

105. The non-District Plan initiatives are clearly very important as we note that despite the significant increase in SNA area introduced as cSNA by PC9, it is evident from the cSNA dataset that the majority of this area achieves its SNA status by being existing or potential habitat of the long-tailed bat, not because it is native vegetation. Only through ecological restoration can the 10% target be achieved.

106. There were 142 submissions made on SNAs, incorporating 472 individual submission points. Most submissions (122) are primarily concerned with the extent of SNAs in specific properties and seek either the adjustment of the SNA boundary or the exclusion of property from the SNA overlay altogether. Other submission points address the broader issues of the SNA scheduling on private property rights with associated requests for amendments to the provisions to enable more flexibility. These submissions are also typically associated with the reduction or removal of an individual SNA from Schedule 9C. There were also submissions which expressed general support for SNAs and sought more effective and extensive protection of biodiversity values.

107. We address the issues raised in submissions in the sections that follow starting with requests for inclusion of indigenous biodiversity outside of SNAs, then moving to spatial extents of SNAs, before ending with a discussion of the PC9 SNA provisions and consistency with the NPS-IB.

6.2 Indigenous Biodiversity outside of SNAs

108. Two issues were raised by the Department of Conservation (DOC) in relation to indigenous biodiversity outside of SNAs. These related to the treatment of non-mapped SNAs, and non-significant indigenous biodiversity.

6.2.1 Non-mapped areas

109. In relation to this issue, DOC submitted that areas which met the criteria for an SNA but which were not mapped in the District Plan should still be subject to the SNA provisions.⁵² The habitat of the black mudfish was given as an example of this, but the submission does not propose the addition of any specific SNA area. The intent of the DOC submission and evidence from Ms Sycamore, RMA Planner for DOC, was to confer SNA status and apply the relevant provisions of Chapter 20 to such areas,

⁵² DOC legal submissions, 17 May 2023, at [9].

in the absence of a Schedule 1 plan change process.⁵³ Mr Inger, Senior Planner and Director of Monocle in Hamilton and planning witness for The Adare Company, did not agree with this approach. He supported the Council PC9 approach which he considered to be robust, appropriate and transparent because it is by way of a Schedule 1 plan change. Mr Inger pointed out that the changes sought by DOC would mean that plan users would be unable to identify from the face of the District Plan where an SNA was located or when/if SNA rules applied.⁵⁴

110. The DOC legal submissions identified statutory support for the SNA recognition sought. This included that any area which met the WRPS significance criteria would be subject to the protection requirements of s.6(c), and that Te Ture Whaimana objective (i) requires “*The protection and enhancement of significant sites, fisheries, flora and fauna*”.⁵⁵
111. In her rebuttal evidence, Ms Galt was of the opinion that the policies proposed by Ms Sycamore were already covered by existing provisions of the District Plan.⁵⁶ Mr Muldowney submitted that the DOC relief was not within the scope of PC9, and that the Council’s approach was consistent with the Environment Court’s comment in *Weston Lea*, that SNAs will be progressively mapped and introduced via successive plan change processes.⁵⁷

6.2.1.1 Discussion and findings

112. We have considered the submissions and evidence and the relevant superior documents, including the now operative NPS-IB. We acknowledge the concerns of DOC in relation to areas that may qualify as SNAs but remain unmapped. However, we find that the process suggested by DOC lacks the transparency required in a plan change process and which is now explicitly part of the SNA assessment process in clause 3.8 of the NPS-IB.
113. The key question for us was whether the absence of the provisions sought by DOC would mean that potential SNA areas, such as black mudfish habitat, would have inadequate protection. In terms of existing provisions we note that Appendix 1.2 Information Requirements requires an assessment of environmental effects for any resource consent, which now also explicitly include effects on indigenous fauna as a result of the s.42A Report author’s recommendations on PC9.⁵⁸ Mr Inger also referred us to the overarching objective and policies for the natural environment in Chapter 2 (Strategic Framework) of the ODP.⁵⁹ In light of that context, we find that the additional provisions sought by DOC are unnecessary. Nevertheless, we

⁵³ Sycamore, Statement of evidence, 28 April 2023, at [47].

⁵⁴ Inger, Rebuttal evidence, 12 May 2023, at [20]-[21].

⁵⁵ DOC legal submissions, 17 May 2023, at [9].

⁵⁶ Galt, Rebuttal evidence - SNAs, 12 May 2023, at [16]-[19].

⁵⁷ Council legal submissions Hearing 1: SNAs, 19 May 2023, at [4]-[5].

⁵⁸ s.42A Report – HHAs, SNAs and NTs, section 5.3.11.

⁵⁹ Inger, Speaking notes, 25 May 2023, at [11].

encourage the Council to continue with its programme of identifying and mapping SNAs pursuant to ongoing plan change processes and note the five year time limit required by clause 3.16 of the NPS-IB.⁶⁰

6.2.2 Non-significant indigenous biodiversity

114. In relation to the matter of “non-significant” indigenous biodiversity, Ms Sycamore pointed out that, clause 3.16 of the NPS-IB addresses all indigenous biodiversity, not just significant indigenous biodiversity, and requires that the effects management hierarchy be applied to address significant effects on this biodiversity, with other effects to be managed to give effect to the objectives and policies of the NPS-IB. Ms Sycamore considered that existing wording in PC9 could be used as the basis for a new policy addressing this matter.⁶¹
115. The Council submitted that DOC’s proposal to amend PC9 to give effect to NPS-IB provisions that did not exist when PC9 was notified, raised clear scope issues.⁶² While the content of clause 3.16 of the NPS-IB would need to be addressed by Council in a plan change as soon as reasonably practicable and within five years, Mr Muldowney’s submission was that the matter was not “on” the plan change and that affected persons would be denied an opportunity to have their say.
116. The Adare Company provided rebuttal planning evidence on this matter through Mr Inger. Mr Inger’s view was that PC9 does not address indigenous biodiversity outside of SNAs. He shared Mr Muldowney’s view that the matter should be addressed in another plan change.⁶³
117. DOC did not provide any legal submissions directly on this matter.⁶⁴

6.2.2.1 Discussion and findings

118. We find that while responding to clause 3.16 is a mandatory policy requirement, that requirement cannot itself expand the scope of PC9. As noted, the NPS-IB came into effect part way through the PC9 process, and after the close of submissions. Compliance with it was therefore not assessed as part of the original s.32, and nor were people able to make submissions on this policy and DOC’s proposal to extend protection mechanisms for indigenous biodiversity beyond SNAs. We consider there are fairness and natural justice considerations that arise in seeking to insert such provisions at this stage of the process. For these reasons we find that the matter is outside the scope of PC9.

⁶⁰ We are aware that the Government has signaled an intention to repeal the requirement in the NPS-IB to identify new SNAs. However, at the time of issuing this decision, no such amendment has been made and as we note in the NPS-IB section further below, we are bound to make our recommendations based on the law as it stands now.

⁶¹ Sycamore, Supplementary evidence – NPS-IB, 22 September 2023, at [24]-[28].

⁶² Council legal submissions Hearing 1: SNAs, 19 May 2023, at [46].

⁶³ Inger, Rebuttal evidence, 12 May 2023, at [12]-[15] and [23]-[24].

⁶⁴ DOC’s submissions being focused on unmapped SNAs and provisions for bats.

119. However, even had we found differently on the scope issue, we do not consider the change is required at this time or that there is a significant risk in leaving this aspect to a future plan change. This is because:

- a) the NPS-IB itself anticipates that a future plan change process will need to be stepped through and sets a time limit of as soon as reasonably practicable or within five years of the commencement date;⁶⁵ and
- b) there is already an existing protection framework in place in the relevant plan and policy documents, as well as the general requirement under the RMA to avoid, remedy and mitigate adverse effects on the environment. In particular, we note the requirements to give effect to the existing WRPS policies on indigenous biodiversity which include ECO-P1 on maintaining and enhancing (all) indigenous biodiversity with references to “no net loss” and the consideration of “biodiversity offsets”.

120. Accordingly, we have not found it necessary or within scope to introduce changes to PC9 to address clause 3.16 of the NPS-IB.

6.3 Spatial extent of SNAs

121. The tenor of submissions opposing the spatial extent of SNAs is succinctly captured in the s.42A Report as follows:⁶⁶

- *the SNA encroaches on property rights and affects ability to undertake desired activities;*
- *the area includes poor quality and degraded vegetation;*
- *dominance of exotics and weeds;*
- *presence of existing orchards, gardens and structures within the area marked SNA;*
- *no ground truthing had been undertaken;*
- *the vegetation has been recently removed or is consented to be removed;*
- *the vegetation was deliberately planted and is not ‘naturally’ occurring; and*
- *to enable future development on the site.*

122. The 4Sight Consulting report describes the methodology undertaken to identify the scheduled SNAs, applying the criteria in APP5 of the WRPS.⁶⁷ In response to the submissions relating to the spatial extent of the SNAs, additional site visits were conducted to ground-truth the overlay and ascertain whether the assignment of SNA status was correct. 4Sight Consulting provided an additional report recording

⁶⁵ NPS-IB, clauses 4.1 and 4.2.

⁶⁶ s.42A Report – HHAs, SNAs and NTs, section 5.3.3.

⁶⁷ s.32 Evaluation Report, Appendix 12 – SNAs, 4Sight Consulting, SNAs of Hamilton City District: Terrestrial and Wetland Ecosystems, June 2022.

the results of this ground-truthing process.⁶⁸ With reference to the report, Mr Dean, Principal Ecology Consultant at 4Sight Consulting, advised that 90 site visits were conducted in response to submissions and that 22 individual SNA were either removed or had boundary changes, responding to 32 submissions.⁶⁹ The report also advises that changes were not generally recommended unless there was a clear misidentification. The detailed mapping changes recommended are listed in Appendix A to the additional report⁷⁰ and the related mapping changes were attached to Mr Dean's primary evidence.⁷¹

123. We noted previously that a feature of the cSNAs was that, being large and linear, they applied to many individual properties. A feature of the database is that each SNA has a singular description, irrespective of how large it is, or whether it applies to more than one property. Using Donny Park as an example, the Site Description states:⁷²

Donny Gully is a relatively large riparian gully east of the Waikato River, adjacent to Fairfield College. Modified wetland habitat including fen and swamp habitat are present in small pockets. Eastern half area is dominated by willows with tree ferns, cabbage trees, western half with mixed native revegetation planting, Carex, exotic grasses. Raupo reedland, Alder-willow treeland, Mixed native shrubland, Manuka shrubland. Bats, freshwater fish and invertebrates present in the stream corridor.

124. Donny Park is assessed as meeting APP5 criteria 1, 3, 4, 6, 8 and 11. Some parts of Donny Park are within a Council Reserve and a QEII covenant applies to a private property in the northern part of the park. The park features kauri (*agathis australis*) in some places, which has a Threatened - Nationally Vulnerable status. The 4Sight Consultancy report records the presence of bats in some parts of the park.⁷³
125. Donny Park has an area of 20ha. The singular description carries the risk of being interpreted as ascribing the stated values to all 20ha, particularly in the absence of ground-truthing over the whole extent of an SNA, which we understand was not possible given the time frames. However, where ground truthing did indicate some variability in the quality of the SNA, it was Mr Dean's view that as individual properties and areas typically formed part of a much larger SNA site it was not ecologically sound to consider them on a standalone basis.⁷⁴ In relation to gully

⁶⁸ Dean, Statement of evidence - SNAs, 14 April 2023, Attachment 2 - PC9 Technical Ecology Report 4Sight Consulting March 2023.

⁶⁹ Dean, Statement of evidence - SNAs, 14 April 2023, at [33] and [41].

⁷⁰ Dean, Statement of evidence - SNAs, 14 April 2023, Attachment 2 - PC9 Technical Ecology Report 4Sight Consulting March 2023, Appendix A.

⁷¹ Dean, Statement of evidence -SNAs, 14 April 2023, Attachment 1.

⁷² s.32 Evaluation Report, Appendix 12 - SNA HCC Master Dataset 230622, Data for C18.

⁷³ Significant Natural Areas of Hamilton City District: Terrestrial and Wetland Ecosystems 4Sight Consulting June 2022 Appendix 12 PC9 Figure 5 p.23.

⁷⁴ Dean, Statement of evidence - SNAs, 14 April 2023, at [44]; and Dean, Rebuttal evidence- SNAs, 12 May 2023, at [9].

systems and corridors, Mr Dean said this in his additional report:⁷⁵

Hamilton's gully systems provide critical habitat for indigenous flora and fauna in a highly modified urban environment, and have allowed threatened species such as long-tailed bats and mudfish to persist despite urbanisation. This includes areas that appear to be of lower ecological values as they can be dominated by exotics and sometimes weedy plant species. Regardless of whether exotic-dominated or indigenous, these gully systems play an important role for fauna species in a wider landscape context.

126. The counterview to that position, expressed by several submitters, was that the criteria in APP5 must be demonstrated for the individual property for it to be included in Appendix 9C, and that the attributes of the larger SNA could not be 'borrowed' or 'haloed' to support the scheduling of the individual property.

6.3.1.1 Discussion and findings

127. In the absence of interrogating the SNA boundary in every instance we are reliant on the judgement exercised by the Council ecologists in establishing the boundaries of the many new cSNAs. Despite Mr Dean's view (as noted in paragraph 125 above), it is apparent from an examination of the boundaries that, in general, the APP5 criteria have been carefully observed and the boundary locations are well supported. However, where we have submissions contesting the SNAs we are required to consider the evidence provided by the property owners.
128. Of the 142 submitters, only five provided expert evidence in support of their submissions, three of which relate to reduction/removal of an SNA (the other two being on PC9 provisions). We discuss this evidence and our findings on it in the next few sections.
129. Following that, we proceed to discuss other submissions that sought the removal or reduction of the SNA on their property, and who appeared and presented lay evidence in support of their positions. While not presenting an 'expert' case, the Panel benefitted in each case by their personal knowledge of the property, often based on many years of developing and caring for vegetated areas.
130. For any areas where we have determined that a different SNA extent is appropriate from that notified, we have accepted the amendments recommended by Mr Dean or otherwise have had updated maps prepared showing the revised SNA extent. These updated maps are attached as **Appendix 4** to this decision.

6.3.2 Fonterra submission #135

131. Mr Chrisp, Partner and Principal Environmental Planner at Mitchell Daysh, provided planning evidence for Fonterra, essentially agreeing with the Council's proposal to delete part of SNA C59 on the Fonterra site.⁷⁶ Mr Dean had agreed with the

⁷⁵ Dean, Statement of evidence - SNAs, 14 April 2023, Attachment 2 - PC9 Technical Ecology Report 4Sight Consulting March 2023, at p.11.

⁷⁶ Chrisp, Statement of evidence, 28 April 2023.

Fonterra submission that such a deletion was in accordance with an exemption in the WRPS criteria concerning vegetation that has been created in connection with artificial structures, such as the water control structures and ponds in Fonterra's wastewater treatment system.⁷⁷

6.3.2.1 Findings

132. This matter has been agreed between Council and Fonterra and we accept that the vegetation in question is subject to the exemption provided in the WRPS criteria. We discuss the implications of the NPS-IB becoming operative in section 6.5 below.

6.3.3 Te Awa Lakes submission #454

133. This submission by Te Awa Lakes Unincorporated Joint Venture and others (TAL)⁷⁸ concerned two separate matters on SNAs C59 and C76.
134. The submission was the subject of expert conferencing between Mr Stephen Gascoigne, the acting Planning Lead for TAL, Mr Peter Loon, Senior Ecologist at Ecology New Zealand Ltd for TAL, and Council staff. Mr Gascoigne and Mr Chad Croft, Principal Ecologist at Ecology New Zealand Ltd, provided expert evidence for TAL, and Mr Gascoigne appeared at the hearing, together with TAL's legal counsel, Mr Thomas Gibbons.
135. On the first matter, the relief sought is the reduction of the SNA C59 overlay from parts of the property. Mr Dean had re-visited the site and agreed with the Loon/Croft assessment for TAL that the SNA extent should be removed from areas that have recently been cleared of vegetation and the area that covers the track. However, he did not support a reduction of SNA to only a 20m-wide corridor due to the habitat it provided for skink and fish species, and potentially bats.⁷⁹
136. The second matter related to the removal of the SNA overlay from areas that had been granted consent for vegetation clearance, for which Mr Gascoigne provided evidence. Mr Gibbons' submissions were that the overlay should reflect that future (consented) environment.⁸⁰ The ecologists were largely in agreement that the ecological values of the two SNAs warranted scheduling, exhibiting one or more of the WRPS criteria. While acknowledging the existence of the resource consent, the Council position, as expressed in Ms Galt's rebuttal evidence, was a reluctance to remove the overlay while the vegetation still existed.⁸¹

⁷⁷ Dean, Statement of evidence - SNAs, 14 April 2023, at [57]-[59].

⁷⁸ Te Awa Lakes Unincorporated Joint Venture, Perry Group and Horotiu Farms Ltd (TAL).

⁷⁹ Dean, Rebuttal evidence -SNAs, 12 May 2023, at [8].

⁸⁰ TAL opening legal submissions 17 May 2023 at [4].

⁸¹ Galt, Rebuttal evidence – SNAs, 12 May 2023, at [24].

6.3.3.1 Discussion and findings

137. We accept the agreement between the parties for the removal of SNA from the identified areas in C59.
138. For those areas subject to a resource consent allowing removal of the vegetation in C76, we agree with the Council that the overlay should remain in case the consent is not exercised at all or differently. TAL has a consent to remove vegetation so is not constrained by maintaining this area on Schedule 9C. Once the consent is exercised, the mapped SNA can be adjusted accordingly at an appropriate time.

6.3.4 Yzendoorn submission #457

139. This submission sought the removal of C26 from the Yzendoorn property at St Petersburg Drive.
140. The submission was supported by evidence from Mr Robb and ecological evidence from Ms Phoebe Andrews, Senior Ecologist at Wildlands Consultants Ltd. Mr Robb's evidence referred to two reasons in support of the removal of C26. Firstly, there is a current application for resource consent to enable development on the site that required some vegetation removal. The ecological assessment of the application was that the effects of this removal could be mitigated. Secondly, Mr Robb referred to the existence of a Council stormwater easement within the C26 area that prohibited the planting of vegetation within the easement area.⁸²
141. The Council ecological and planning response was based on the original assessment of C26 by 4Sight Consulting which found this area of indigenous vegetation met six of the WRPS criteria. Ms Andrews considered that it met only criterion 11 in relation to vegetation or habitat that is part of an ecological linkage.⁸³ While the Council agreed that C26 should be removed from the easement area, it did not agree that the yet-to-be decided application supported additional removal of the overlay.⁸⁴

6.3.4.1 Discussion and findings

142. We have considered the ecological evidence for the property and there is agreement that the planted indigenous shrubland qualifies for inclusion as SNA. The unsettled outcome of the resource consent (and potential clearance of some of this vegetation) is not a matter that the Panel can or need consider. We agree with the parties' initial conclusions that the overlay should be removed from the easement area. However, we first need to check that such is open to us under the now operative NPS-IB – which we discuss in section 6.5 below.

⁸² Robb, Statement of evidence, 28 April 2023, at [11].

⁸³ Andrews, Statement of evidence, 3 May 2023, Table 1.

⁸⁴ Galt, Rebuttal evidence – SNAs, 12 May 2023, at [11].

6.3.5 Mary Burton submission #270

143. Ms Burton's submission related to c18 for Donny Park, which extended over part of her property at River Road. Ms Burton presented her own submission and was supported by legal submissions from Dr Joan Forret. While Ms Burton was not an ecologist, she was a landscape designer and consultant with 40 years' experience and consequently brought significant knowledge of the natural environment to her evidence.
144. Ms Burton's property is a rear property which falls quite steeply into a gully on the northern side of the southern extent of Donny Park. The mapped c18 extends up the gully and covers parts of several properties. We have described the SNA features of Donny Park (in paragraphs 123 to 125) above. Ms Burton described the state of the gully when she purchased the property over 20 years ago as being neglected and growing many noxious weeds. Over the intervening period she has undertaken significant landscaping works with pathways, steps, bridges and garden art to complement the mix of native, exotic and fruit trees she has planted. We did not undertake a site visit; however Ms Burton provided a number of photos of her garden. The property does not have a permanent watercourse however Ms Burton advised that stormwater did flow through her garden and the Council had agreed to install an overland flowpath following floods in April 2022.
145. The cSNA dataset applying to her property was that for Donny Park as a whole, for which Criteria 1, 3, 4, 8 and 11 are listed.⁸⁵ Ms Burton disputed that any of the APP5 criteria applied to her property. In relation to Criterion 1, an area already subject to statute for protection, she pointed out that this related only to a northern part of Donny Park situated off Wymer Terrace. In relation to the other criteria Ms Burton advised that her garden did not contain under-represented indigenous vegetation, nor a watercourse or wetland, although these obviously existed elsewhere in Donny Park. There is no record of her property being a habitat of indigenous species and Ms Burton had no knowledge of bat activity.
146. Dr Forret's legal submissions referred to the principles for assessing SNAs in Clause 3.8 of the (then exposure draft) NPS-IB. Dr Forret submitted that there had been a lack of transparency as to how this property had been assessed for inclusion within the SNA. She also submitted that none of the APP5 criteria applied to Ms Burton's property and traversed each of the criteria in detail. With reference to the Waikato RPS objectives and policies, Dr Forret stated:⁸⁶

These objectives and policies require an assessment of ecosystems in the context of overall health and habitat of indigenous biodiversity. The policies refer to regional significance and to the interconnection between significant habitats for vegetation and native fauna. These policy criteria are not aimed at private gardens that have been created to enhance steep slopes and to

⁸⁵ Criterion 6 was added to Donny Park to recognise the wetland in the PC9 Recommendations Version.

⁸⁶ Burton legal submissions, 17 May 2023, at [13].

*reflect the landscape preferences of particular landowners. They are there to retain **significant** habitat connections and to protect threatened species where they are known to be living.*

147. The property was subject to a ground-truthing exercise by 4Sight Consulting staff. While Ms Burton's evidence records that the visiting staff member stated, "*that the peninsula over my property lacked connectivity to the rest of the Donny Park SNA to justify being included in the proposed SNA*,"⁸⁷ the scheduling was maintained as notified, with the comment that "*Some open grass areas within this area but overall ecological value is consistent with the rest of the SNA.*"⁸⁸

6.3.5.1 Discussion and findings

148. This submission is a prime example of the alternative viewpoints on the identification of SNAs that we have discussed above. To reiterate, these alternatives are that either:
- a) the boundaries of an SNA are to be considered 'ecologically' thus including:
 - i) all or most vegetated areas around an undisputable 'core' of indigenous vegetation and natural features; or
 - ii) recorded habitat of significant indigenous species, including areas of lesser value which are needed to provide a buffer to that core; or
 - b) each area of SNA, particularly those around the periphery, must demonstrate that they meet the requirements of APP5 (meeting one or more of the criteria).
149. Our principle finding on considering these alternative viewpoints is that while accepting the ecological approach, where contested, the inclusion of areas that are peripheral to the core SNA must be objectively verified in each case. For APP5 Criteria 1-10, the presence or absence of the features referred to are able to be objectively verified by observation. Criterion 11 introduces an element of subjectivity where it refers to the buffer, linkage or corridor being '*necessary*' to protect any site identified as significant under Criteria 1-10. Clearly, there is a judgement call to be made in each case.
150. We find in relation to Ms Burton's property that the case for inclusion has not been made out and it should be excluded from the Donny Park SNA. When the configuration of the SNA mapping up this side gully is considered we propose that the Council truncate the SNA along the northern boundaries of 724 River Road and 12 Charmaine Crescent.

⁸⁷ The Panel cannot place weight on this statement in the absence of any corroborating statement from the staff member.

⁸⁸ Dean, Statement of evidence – SNAs, 14 April 2023, Attachment 2 – PC9 Technical Ecology Report 4Sight Consulting March 2023, Appendix A.

151. We have not reached this conclusion lightly. However, we found Ms Burton’s description of her garden, based as it is on both her professional work and her personal knowledge, more compelling than the ecological assessment which was generalised for the core area of Donny Park. We have also considered the risk to the SNA values of Donny Park of excluding this side gully. Such is the nature of the topography of the gully that it is highly unlikely that any development will adversely affect its natural values. The indigenous vegetation will remain and its potential for bat use does not need the support of SNA mapping.

6.3.6 N Caiger/Mactan Property Trust #364

152. The submission relates to a small piece of land at Tauhara Drive. Ms Caiger presented photos of the rear (northern) part of her property which is proposed to be included in Schedule 9C. The land is part of C54 Tauhara Park – Kirikiriroa Stream. Ms Caiger’s photos confirm that this land has little to recommend it in terms of indigenous vegetation. However, it is a cSNA and has recorded bat presence.⁸⁹ The property extends well into the gully and the continuity of the bat habitat, and the riparian margin, at this point relies on its contribution.

6.3.6.1 Discussion and finding

153. We find that the contribution that the cSNA over this property makes to C54 supports the retention of the boundary as notified.

6.3.7 H and D Nielsen #126

154. The Nielsen’s submitted in relation to their property at River Road. The northwestern corner of the property is proposed as part of C78, the Waikato River SNA. This section of the SNA widens out beyond the 20m – 40m river margin into private property. Ms Nielsen explained and provided photos of the vegetation on the property. It is apparent from this that the property is not included for its vegetation significance but as part of the overall corridor values of C78. Mr Dean recommended a small SNA reduction to exclude fruit trees.⁹⁰

6.3.7.1 Discussion and finding

155. We find that the SNA can be removed from this property without adversely affecting the robustness of C78 along the river corridor and which at this point and further north provides a 50m – 60m wide buffer to the river.

6.3.8 S Gale #308

156. Mr Gale is the owner of a property on River Road and, like the Nielsen’s, has part of the Waikato River SNA C78 on his property. Mr Gale considered the mapping of the

⁸⁹ Significant Natural Areas of Hamilton City District: Terrestrial and Wetland Ecosystems 4Sight Consulting, June 2022, Appendix 12, Figure 5, p.23.

⁹⁰ Dean, Statement of evidence – SNAs, 14 April 2023, Attachment 2, PC9 Technical Ecology Report 4Sight Consulting March 2023, Appendix A, p.76.

SNA in his locality to be very arbitrary, essentially extending to include vegetation along the riverbank riparian area and within private property but being very narrow and even discontinuous in some areas. His property includes native vegetation under the exotic canopy and he acknowledged the existence of a small seep or wet area. He expressed concern about the restrictive rules associated with the SNA mapping. Mr Dean recommended the retention of the SNA extent as notified.⁹¹

6.3.8.1 Discussion and finding

157. While the mapping of the broader SNA C78 meets the criteria for scheduling, we find that the presence of these characteristics on the property are unlikely and that the variability in the SNA boundaries in the locality is very arbitrary as Mr Gale noted. We find that the SNA should be removed from the property. The buffer provided by C78 to the river at this point remains more than 50m.

6.3.9 M and S Paris #286

158. This submission relates to a property on Keswick Crescent the rear part of which has been included in C35 Mangaiti Gully – Upstream based on the Mangaiti Reserve. The ecological evidence from the Council shows the Mangaiti Gully having recorded bat presence and uncommon and underrepresented fauna and flora species.⁹² From the Paris' evidence it appears that these are unlikely to be present within their property. Nevertheless it does contribute to the necessary buffer within this side gully. Mr Dean recommended a minor reduction in the SNA to clear gardens and fruit trees.⁹³

6.3.9.1 Discussion and finding

159. We find that the SNA boundary should remain largely as already modified. However, we note the irregularity of the boundary over this and the adjacent property and find that a line drawn approximately 10m from the western boundary of the property would better support the future administration of the SNA in this locality and not detract from the SNA values of C35.

6.3.10 MJ and J Griffin #222

160. This submission relates to a property situated on State Highway 26 in the City's southwest. Mr Griffin opposed the SNA over the southern half of his property which was within the Mangaonua Gully and SNA C40 of the same name. The Council responded by relocating the boundary approximately 15m further south to exclude a paddock area.⁹⁴ We note that parts of Mangaonua Gully were existing SNA and

⁹¹ Dean, Statement of evidence – SNAs, 14 April 2023, Attachment 2, PC9 Technical Ecology Report 4Sight Consulting March 2023, Appendix A, p.77.

⁹² s.32 Evaluation Report, Appendix 12 - SNA HCC Master Dataset 230622, Data for C35.

⁹³ Dean, Statement of evidence – SNAs, 14 April 2023, Attachment 2, PC9 Technical Ecology Report 4Sight Consulting March 2023, Appendix A, p.77.

⁹⁴ Dean, Statement of evidence – SNAs, 14 April 2023, Attachment 2, PC9 Technical Ecology Report 4Sight Consulting March 2023, Appendix A, p.76.

that C40 had extended the area along the western section adjacent to the City boundary, recognising its corridor nature. The Gully has several records of bat presence.⁹⁵ Mr Griffin did not present any information supporting further reduction of the SNA.

6.3.10.1 Discussion and finding

161. The extension of C40 to the west is an important corridor linkage along the Mangaonua Stream from the southwest of the City to rural Waipaa. We find that the SNA over the property should be retained.

6.3.11 T Street #323

162. Mr Street submitted in relation to his property at Minchin Crescent, the rear portion of which contributes to C64, the main Waikato River cSNA extending along the river through the City. Mr Street proposed a minor reduction in the SNA boundary that still maintains a substantial buffer to the river and, as he pointed out, is wider than the buffer on the Council land immediately to the south.

6.3.11.1 Discussion and findings

163. We accept Mr Street's proposal and find that the reduction does not detract from the integrity of C64 at this point and should follow the alignment suggested in his evidence.⁹⁶

6.3.12 J Caradus #434

164. Mr Caradus presented online in support of his submission seeking the removal of part of C71 – Waikato River (Hamilton Gardens) from his property at Geoffrey Place, Riverlea. Mr Caradus' original submission provided a significant amount of detail on the history of the site and how he had planted it with indigenous vegetation and landscaped the property over the years to create the current environment. There is currently no dwelling on the property and Mr Caradus lives in the dwelling on the adjacent property in Geoffrey Place. This part of the Waikato River cSNA is within an area of high bat activity and we understand the desirability of mapping as much land as possible within C71 to support that habitat.⁹⁷

6.3.12.1 Discussion and findings

165. We have weighed Mr Caradus' evidence against the potential for this property to be necessary for and make a significant contribution to C71. Given the background of the property and its relative disjunction from the 40m -50m of robust river riparian

⁹⁵ Significant Natural Areas of Hamilton City District: Terrestrial and Wetland Ecosystems 4Sight Consulting June 2022 Appendix 12 PC9 Figure 5 p.23.

⁹⁶ Street, Hearing statement p.3.

⁹⁷ Significant Natural Areas of Hamilton City District: Terrestrial and Wetland Ecosystems 4Sight Consulting June 2022 Appendix 12 PC9 Figure 5 p.23.

habitat, we find that the criteria for which C71 is mapped is not sufficiently demonstrated. We find that it should be removed from Schedule 9C.

6.3.13 R van der Poel #264

166. Ms van der Poel submitted in relation to her property at Balloch Street, the rear 60% of which is in a gully and is part of C46 Ranfurly Park. SNA C46 was based on a historical fSNA but had been significantly enlarged over the remainder of the vested Ranfurly Park reserve area and extended to the southeast up a long gully towards Claudelands and the Claudelands Bush SNA F65, a known bat habitat. The area of C46 on Ms van der Poel's property extends across the entire width of the SNA and contains a watercourse and mixed indigenous (kanuka)/exotic vegetation. Ms van der Poel spent time maintaining her forested area and was concerned about her ongoing ability to do so with the SNA status. Her property is adjacent to the Ranfurly Park, and she had experienced security problems from trespassers.

6.3.13.1 Discussion and findings

167. On balance, we find the gully area should be retained as SNA as notified given its critical contribution to the C46 extension to the southeast. However, Ms van der Poel's efforts at maintaining her property should be supported and we consider the amendments proposed to the SNA management provisions will assist in achieving this, including the ability to fence her property, which would help with people knowing that they are not within the reserve.

6.3.14 P Morgan #279

168. Ms Morgan attended the hearing in support of her submission which expressed concern about the implications of the SNA scheduling. Her property at Urlich Road was part of C39 - Mangakootukutuku West Gully – Sandford Park. The four Mangakootukutuku cSNAs combine to make one of the most extensive cSNA features in the City, following the many incised gullies in the Mangakootukutuku Stream catchment to the south and west of the Waikato River. The gully is noted bat habitat.⁹⁸ Like many of the submitters attending, Ms Morgan had spent many hours over an extended period of years planting and landscaping her property. In response to questions she made it clear that she supported the purpose of the SNA but did not want to be hindered in her ongoing works.

6.3.14.1 Discussion and findings

169. We note that Mr Dean had responded to Ms Morgan's concerns about the extent of the SNA by removing it from the upper lawn and garden area. We accept the revised alignment as proposed by Mr Dean. The amendments proposed to the SNA

⁹⁸ Significant Natural Areas of Hamilton City District: Terrestrial and Wetland Ecosystems 4Sight Consulting June 2022 Appendix 12 PC9 Figure 5 p.23.

management provisions will assist Ms Morgan in her ongoing management of the property.⁹⁹

6.3.15 All Other Submissions on Extent of SNA

6.3.15.1 Discussion and findings

170. In relation to all other submissions on the extent of the SNA on private property we concur with the advice from Mr Dean, whether this be to retain, retain in part or remove, and find accordingly. We attach in **Appendix 4** revised plan maps of those three other amended SNA's that the Panel has determined (i.e. 8 Minchin Crescent, 27 Keswick Crescent and 736a River Road).

6.4 Submissions on Objectives, Policies, Rules and other Provisions

171. Several submitters focussed on the PC9 SNA provisions in Chapter 20 and related sections of the District Plan. Submissions included references to the (then draft) NPS-IB, which was subsequently made operative on 4 August 2023.
172. The s.42A Report responded to the submissions taking each provision in turn and we follow that approach also. We do not comment on every change sought by submissions but concentrate on the more substantive ones. Unless otherwise noted, for minor amendments we follow the advice provided by Council. The Council also recommended a number of consequential changes to the provisions in response to submissions.

6.4.1 Objectives and Policies

173. The s.42A Report notes that Objectives 20.2.1 and 20.2.2 are not substantially changed and that Policies 20.2.1(a)-(l) and 20.2.2(a)-(b) have been revised to reflect the amended approach to identifying, protecting, restoring and enhancing SNAs.¹⁰⁰
174. With the exception of the new objective and policies for the long-tailed bat which we address below, there were few substantive amendments to the notified version of PC9 Objective 20.2.1 and related policies. Such amendments that were made reflected consistency with the superior documents such as the WRPS and the NPS-IB in its operative form.

6.4.2 New Objective and Policy for the Long-Tailed Bat

175. A new objective was introduced in relation to the protection and enhancement of significant habitat for the long-tailed bat. This objective was the subject of expert conferencing and further communications following the Joint Witness Statement (JWS). Most of the new wording in the JWS is as per the version provided by Ben

⁹⁹ Dean, Statement of evidence - SNAs, 14 April 2023, Attachment 1, p.41, SNA map for 76 Ulrich Avenue #279.

¹⁰⁰ s.42A Report – HHAs, SNAs and NTs, section 5.3.4.

Inger for The Adare Company with some rewording to ensure consistency with other Chapter 20 policies in relation to the effects management hierarchy.¹⁰¹

6.4.3 Rules for Pruning, Maintenance, Planting and Removal

176. PC9 amended the provisions for these works within SNAs making some distinction in activity status between cSNAs and fSNAs, being more enabling for the former. PC9 also introduced a rule for pruning and maintenance of the canopy of a tree overhanging the boundary of an SNA, where the trunk is located within the SNA. Some minor changes were recommended by Council in relation to submissions including clarification about pruning in relation to the spread of disease or imminent risk to public health, safety or property, and the allowance of pruning or maintenance within 1m of an existing lawfully established building.

6.4.4 Rules for Buildings, Structures, Infrastructure, Public Walkways and Cycleways

177. These provisions were the subject of several submissions expressing concern about the undertaking of relatively minor or necessary and anticipated works within SNAs. Such works included ancillary residential structures such as fences, walls, access tracks, boardwalks, steps and terraces, but excluding buildings or swimming pools. Such activities are recommended to have a permitted activity status within cSNAs but are restricted discretionary activities within fSNAs.

6.4.5 Planting

178. PC9 enabled the planting of indigenous vegetation within SNAs through a permitted activity status, but the planting of exotic trees was only provided for in relation to erosion control, and stability or restoration purposes, subject to the obtaining of a restricted discretionary activity consent. Several submitters sought that the latter activity be permitted in a cSNA.

6.4.5.1 Discussion and findings

179. In relation to the provisions addressed in sections 6.4.1 to 6.4.5 we observe that these were largely minor amendments and focussed on ensuring that activities within SNAs were not unduly onerous in terms of activity status or information requirements. The additional objective and policies for the protection of the long-tailed bat were substantively agreed between the parties. We find in favour of the recommended Council provisions.¹⁰²

6.4.6 Noise

180. DOC presented legal submissions, planning evidence from Ms Ashiley Sycamore, and ecological evidence from Dr Kerry Borkin, a Science Advisor at DOC, in support of its request for the inclusion of noise provisions.

¹⁰¹ JWS Planning, 20 March 2023, section 3.3.6.

¹⁰² PC9 Chapter 20 Natural Environments Recommendations Version 2, 2 June 2023.

181. Dr Borkin's evidence was that there is international research that shows bat feeding is reduced in noisier areas and that bats avoid noise. Recent Hamilton research demonstrated that increased noise resulted in fewer bat calls.¹⁰³ Dr Mueller acknowledged the potential of noise to negatively affect long-tailed bats and their usage of habitat and agreed that, adopting the precautionary principle, noise in SNAs should be limited as much as possible. However, she considered that the research was still emerging, and it currently did not provide any guidance as to effective controls, limits or mitigation measures. Moreover, the implementation of controls, as with lighting, are challenging in an existing urban environment.¹⁰⁴
182. Ms Sycamore proposed a policy on ensuring that noise does not adversely affect indigenous fauna in an SNA.¹⁰⁵ Ms Galt's evidence was that this policy, on its own and without standards, should not be included.¹⁰⁶ Mr Inger shared Ms Galt's views about the inclusion of such a policy being inappropriate and advised that no provisions for managing noise in relation to SNAs or Significant Bat Habitat Areas were imposed in the Peacocke Precinct.¹⁰⁷ Ms Galt's opinion was that the introduction of noise standards would not be within scope for PC9.¹⁰⁸

6.4.6.1 Discussion and findings

183. We consider there are both scope and evidential issues with the relief sought by DOC.
184. In terms of scope, we note that noise provisions were not sought in DOC's original submission, and there may be people affected by the change who would not have been on notice that such provisions could be introduced, and therefore have not had a reasonable opportunity to participate in this plan change.
185. In terms of evidence, we find that there is insufficient evidence to include provisions limiting noise in or near SNAs. Further, we find that if such evidence did exist it would need to inform a full set of objectives and policies, and rules on the appropriate noise levels, avoidance and mitigation required to achieve these objectives and policies in the usual manner. None of that information was before us.
186. If DOC wishes to pursue such provisions we consider the appropriate course is a separate Schedule 1 process where such provisions form part of the s.32 evaluation and the notified plan change.

¹⁰³ Borkin, Statement of evidence – SNAs, 28 April 2023, at [13.1].

¹⁰⁴ Mueller, Rebuttal evidence – SNAs, 12 May 2023, at [6]-[7].

¹⁰⁵ Sycamore, Statement of evidence – SNAs, 28 April 2023, at [29].

¹⁰⁶ Galt, Rebuttal evidence – SNAs, 12 May 2023, at [13].

¹⁰⁷ Inger, Rebuttal evidence, 12 May 2023, at [11].

¹⁰⁸ Galt, Rebuttal evidence – SNAs, 12 May 2023, at [15].

6.4.7 Lighting

187. DOC submitted that changes were required to three standards relating to lighting and glare in order to protect the long-tailed bat within an SNA:
- a) The lighting limit at the SNA boundary should be 0.1 lux, rather than 0.3 lux;
 - b) The colour temperature standard in Rule 25.6.4.Xiii be 2700K, rather than 3000K; and
 - c) The duration timer for exterior security lighting motion sensor should be 1 minute, rather than 5 minutes.
188. The changes in each of these standards was supported in evidence by Dr Borkin. Dr Borkin's evidence referred to both local and overseas research which suggested that the long-tailed bat is sensitive to light. Further that increasing the amount of blue wavelength light is related to a decrease in bat activity.¹⁰⁹ Her prescription for reducing the amount of light at the SNA boundary also included other management measures such as increasing the distance that lights are setback from areas that bats use.¹¹⁰
189. The Council responded to the DOC relief on lighting through ecological evidence from Dr Mueller and lighting evidence from Mr John McKensey, Executive Engineer of LDP Ltd.
190. Dr Mueller agreed in her rebuttal evidence that a 0.1 lux limit (rather than 0.3 lux) would further reduce potential adverse effects on bats associated with artificial lighting. However, on the standards referred to in paragraph 187 b) and c) above, she advised that there was no explicit research differentiating 3000K from 2700K as a measure of colour temperature and that she was not aware of any scientific evidence that provide guidelines on the length of motion sensor timers with respect to minimising effects on long-tailed bats. Adopting a precautionary approach however, she supported the lower colour temperature limit.¹¹¹
191. Mr McKensey's lighting evidence addressed the practicalities of imposing an SNA boundary lighting standard in the context of an existing urban environment. Consequently, based on modelling he had undertaken he recommended building setbacks for buildings of different heights from the SNA boundary as a proxy for meeting 0.3 lux at the residential boundary (or 0.1 lux within the SNA).¹¹²
192. The s.42A Report recommended an additional rule be included as Rule 25.6.4.X in relation to lighting activities adjacent to SNA boundaries adopting Mr McKensey's

¹⁰⁹ Borkin, Statement of evidence, 28 April 2023, at [14.1]-[14.5].

¹¹⁰ Borkin, Statement of evidence, 28 April 2023, at [15.1].

¹¹¹ Mueller, Rebuttal evidence – SNAs, 12 May 2023, at [10]-[13].

¹¹² McKensey, Rebuttal evidence – SNAs, 12 May 2023, at [9]-[13].

setback approach. This rule also included reference to the characteristics of lighting within 20m of, and within, an SNA.¹¹³

193. In response to these changes the differences between the parties as identified in the legal submissions from both Council and the DOC were on the colour temperature and the length of motion sensor timers.

6.4.7.1 Discussion and findings

194. We find that there is evidential support for the reduction of the colour temperature to 2700K from all parties, albeit that Dr Mueller had some reservations on the benefits of this reduction for the long-tailed bat, and we were advised that the 3000K light bulbs were currently more available in the marketplace. Nevertheless, our finding is to amend the standard in Rule 25.6.4.X to refer to 2700K.
195. Conversely, we are not so persuaded by the DOC submission to reduce motion sensor time to 1 minute from 5 minutes. In not finding in favour of this reduction we are observant of the other mitigating factors for outdoor lighting within 20m of an SNA, including the requirement to emit zero upward light and being mounted as low as practical.

6.5 PC9 Consistency with NPS-IB

196. As we have noted, the NPS-IB came into effect on 4 August 2023 over a year after PC9 was notified. Panel Directions #9 and #13 provided an opportunity for the Council and submitters to make submissions and provide evidence on the NPS-IB. We received the following submissions and evidence:
- a) The Council addressed the NPS-IB in its opening legal submissions for Hearing 2 on 1 November 2023 and provided supplementary evidence from Mr Dean and Ms Buckingham, Consultant Planner for 4Sight Consulting;
 - b) DOC provided submissions by way of memorandum dated 22 September 2023 and supplementary evidence from Ms Sycamore;
 - c) D and B Yzendoorn provided legal submissions dated 1 November 2023; and
 - d) The Adare Company, through Mr Inger, provided rebuttal evidence on matters raised by DOC.
197. There were three key issues:
- a) identification of SNAs;
 - b) exemptions / exceptions; and
 - c) consistency of provisions.

¹¹³ s.42A Report – HHAs, SNAs and NTs, Update Statement, 2 June 2023, at [25]-[29].

198. We summarise the evidence and submissions for each issue in turn but combine our discussion and findings into one section at the end of this part of the decision. We also briefly address the effect of the Government’s recent statement regarding its proposal to remove the obligation under the NPS-IB to identify new SNA areas.¹¹⁴

6.5.1 Identification of SNAs

199. Mr Muldowney advised that, there being no transitional provisions in the NPS-IB, the Council is required to identify SNAs that meet the criteria in the NPS-IB as soon as possible, but at least within five years of commencement. That said, the extent to which PC9 can give effect to the NPS-IB is limited by the scope of PC9 and if any matters are outside that scope (as determined by the orthodox legal tests set out in *Clearwater*), then such matters will require addressing in a future plan change.¹¹⁵
200. Clause 3.8 of the NPS-IB requires Territorial Authorities to identify SNAs across their districts in accordance with Appendix 1. However areas already identified as SNAs at the commencement of the NPS-IB need not be re-identified if a qualified ecologist confirms that the methodology used was consistent with the approach in Appendix 1. Mr Muldowney submitted that as the SNAs identified in PC9 had immediate legal effect upon notification, they are considered to be ‘already identified’ at commencement of the NPS-IB.¹¹⁶
201. Mr Dean provided evidence that compared the PC9 approach for identifying SNAs with that in Clause 3.8 and Appendix 1 and concluded that while there are some differences in the criteria, overall the PC9 identification methodology is consistent with the NPS-IB.¹¹⁷ Accordingly, Mr Muldowney submitted that there are no changes required to the spatial extent of the SNAs (as mapped/listed in PC9 and updated through Mr Dean’s Hearing 1 evidence) in order to give effect to the NPS-IB.

6.5.2 Exemptions / Exceptions¹¹⁸

202. Mr Muldowney referred to two instances where the PC9 approach was at variance with the NPS-IB mapping requirements,¹¹⁹ as addressed by Ms Buckingham in her supplementary evidence.¹²⁰ These were Fonterra #135 and Yzendoorn #457 for which we have recommended exemptions/exceptions above. Mr Muldowney advised that while the Council had previously recommended the exclusion of these areas for practical planning reasons, that option was no longer available as the

¹¹⁴ Ministerial Statement of Andrew Hoggard, 14 March 2024.

¹¹⁵ Memorandum of Counsel for the Council, 19 July 2023, at [6], and Council legal submissions Hearing 2, 1 November 2023, at [109].

¹¹⁶ Council legal submissions Hearing 2, 1 November 2023, at [108].

¹¹⁷ Dean, Supplementary evidence – NPS-IB, 1 September 2023, at [6] and [47].

¹¹⁸ Note: these terms are used synonymously in the NPS-IB (*exception*) and the WRPS (*exemption*).

¹¹⁹ Council legal submissions Hearing 2, 1 November 2023, at [110].

¹²⁰ Buckingham, Supplementary evidence – NPS-IB, September 2023, at [23].

*“NPS-IB requires the spatial identification of SNAs on an ecological merits basis only and does not provide for exemptions.”*¹²¹ He accordingly submitted that these two areas should be retained as SNA.

203. Ms Buckingham did however suggest that site-specific SNA provisions could potentially be supportable for sites where the NPS-IB anticipates an alternative approach to managing effects. For example the Fonterra site where the exception in clause 3.11(4) of the NPS-IB applies. However Ms Buckingham cautioned that any such provisions would still need to allow for the applicable effects management approach in the NPS-IB to be followed.¹²²
204. Mr Gibbons presented submissions for D and B Yzerdoorn. He contested the validity of the process followed by Council to identify SNAs and submitted that the exception provided in clause 3.11(4) of the NPS-IB would also apply to the Yzerdoorn site.¹²³ In supplementary submissions, Mr Gibbons reinforced these points and sought that PC9 either be withdrawn so that the methodology could be reviewed, or that any SNA be excluded from the Yzerdoorn site.¹²⁴

6.5.3 Consistency of provisions

205. Ms Buckingham also assessed the PC9 provisions against the NPS-IB direction on how to manage adverse effects on indigenous biodiversity from various activities. Ms Buckingham advised that the provisions gave effect to the NPS-IB, with the exception of a small number of amendments where the wording required amendment to accord with the gazetted version of the NPS-IB. These amendments were set out in Attachment 1 to her supplementary evidence and related to:¹²⁵
- a) Policy 20.2.1d and the effects management hierarchy;
 - b) Standard 20.5.7 in relation to the operation, maintenance, renewal or upgrading of, or access to, existing infrastructure and public walkways and cycleways;
 - c) Amendments to the definition of “*biodiversity compensation*” and “*biodiversity offset*”; and
 - d) Appendix 1.2 Information Requirements.
206. WRC supported Ms Buckingham’s amendments and her assessment but reserved its position in terms of consistency of PC9 in identifying SNAs in accordance with the

¹²¹ Council legal submissions Hearing 2, 1 November 2023, at [112].

¹²² Buckingham, Supplementary evidence – NPS-IB, 1 September 2023, at [23].

¹²³ Yzerdoorn legal submissions, 1 November 2023, at [12].

¹²⁴ Yzerdoorn legal submissions, 1 November 2023, at [8]-[9].

¹²⁵ Buckingham, Supplementary evidence – NPS-IB, 1 September 2023, at [57] and Attachment 1.

NPS-IB.¹²⁶ We note that while the position was ‘reserved’ WRC did not address us further on this matter.

207. Ms Sycamore also supported Ms Buckingham’s amendments but continued to seek other amendments in relation to unmapped areas, noise and lighting which we have already addressed above.¹²⁷

208. No other party provided any specific comments on these matters.

6.5.3.1 Discussion and findings

209. We accept that we are required to apply the NPS-IB to the extent we have scope to do so under PC9.

210. While we note that the Government has indicated an intention to suspend the requirement under the NPS-IB to identify new SNAs,¹²⁸ that intention will not take effect until the legislation or NPS-IB is actually amended.¹²⁹ We are required to apply the legislation and policy framework in force at the date of our decision, and therefore take no account of any such potential changes. In any event, as PC9 was notified prior to the NPS-IB coming into force, the ‘new’ SNAs were identified to give effect to s.6(c) and other RMA policy and plan obligations (not the NPS-IB). The NPS-IB simply serves to reinforce the requirements to identify and protect such areas.

211. In terms of the identification of sites, we accept the NPS-IB requires sites to be identified on an ecological merits basis. We also accept the Council’s evidence that overall the identification methodology used in PC9 is consistent with the NPS-IB. While the methodology was strongly contested in legal submissions by counsel for TAL we had no expert evidence disagreeing with Mr Dean’s conclusions.¹³⁰ We do not accept that withdrawal of PC9 (as urged by TAL’s counsel) is an appropriate or available option given the directives in the legal and policy framework to protect SNAs.

212. In terms of the exceptions, we note that clause 3.11(4) only exempts compliance with the avoidance of effects requirement in clause 3.10(2). It does not exempt the NPS-IB from applying. The effects of any new subdivision, use or development on an SNA must therefore still be managed by applying the effects management hierarchy (as per clause 3.10(3)). This means that we are not able to exclude the Fonterra site and the Yzendoorn sites from being classified as SNAs. We do however consider that the exception in clause 3.11(4) is met for both sites, since the vegetation was established and is managed for purposes other than maintenance or restoration of

¹²⁶ WRC letter, at 19 September 2023, at [5]-[7].

¹²⁷ Sycamore, Supplementary evidence – NPS-IB, 22 September 2023, at [9] and [11].

¹²⁸ Ministerial Statement of Andrew Hoggard, 14 March 2024.

¹²⁹ As acknowledged the Minister Hoggard in a subsequent statement on 15 March 2024.

¹³⁰ The ecological assessment provided by Mr and Mrs Yzendoorn and attached to their submission (#301) had been prepared for their resource consent application and did not address NPS-IB issues.

indigenous biodiversity.¹³¹ This means that while such sites are still classified as SNAs, any new subdivision, use or development is not subject to the strict avoidance requirement in clause 3.10(2) but instead must be managed by applying the effects management hierarchy.

213. We have therefore amended the PC9 provisions to include site-specific provisions for the two sites concerned to make that clear. We propose that the following permitted activity (PER) be introduced at the head of activity status rule Table 20.3:

Activities in a Significant Natural Area, Schedule 9C (Volume 2, Appendix 9) which qualifies as an exception pursuant to Clause 3.11(4)(a) of the National Policy Statement for Indigenous Biodiversity 2023

aa. Activities in Table 20.3 not provided for as permitted activities, including Rules eb., ha. and jc., where any loss of indigenous biodiversity values is necessary to meet the purpose for which the scheduled SNA is excepted:

- i. That part of cSNA 59 within the Fonterra site being part of the wastewater system and qualifying as an exception as shown on the Planning Maps;*
- ii. That part of cSNA 26 at 29 Petersburg Drive within the Hamilton City Council easement for the right to drain water and qualifying as an exception as shown on the Planning Maps.*

214. The above satisfies the purpose of the NPS-IB exceptions provision in that adverse effects on the indigenous biodiversity values are avoided to the extent practicable.

215. In terms of the consistency of the provisions, we accept the evidence of the Council (for which there was general support) that the provisions of PC9 are consistent with the NPS-IB. We have addressed the reasons why we consider unmapped areas, noise and lighting provisions should not be included in earlier sections.

7 Archaeological and Cultural Sites

7.1 Introduction

216. The ODP currently contains 30 archaeological and cultural sites in Appendix 8 Schedule 8B which are subject to development controls, and 42 sites in Schedule 8C which are for information purposes only.

217. PC9 seeks to create better alignment between the ODP and the New Zealand Archaeological Association (NZAA) ArchSite database. To this end PC9:¹³²

¹³¹ Chrisp, Statement of evidence, 28 April 2023, at [3.1] which notes that the vegetated gully areas were developed for land-based treatment and disposal of wastewater and stormwater associated with dairy manufacturing activities on the site; and Yzendoorn legal submissions, 1 November 2023, at [12], where Mr Gibbons submits that the broader area outside the property was established as part of the infrastructure associated with a residential subdivision and the only reason there is vegetation and potentially fauna there is because of “benign neglect”.

¹³² Council legal submissions Hearing 2, 1 November 2023, at [69]-[70].

- a) adds 56 archaeological sites to Schedules 8B and 8C;
- b) transfers some sites between Schedules 8B and 8C;
- c) corrects some site names, numbers and descriptions,
- d) includes the updated sites in the maps;
- e) amends the mapped extent of sites to match those in ArchSite;
- f) amends the provisions to:
 - i) require controlled activity consent for earthworks on Schedule 8C sites;
 - ii) make Schedule 8C sites subject to the same subdivision rules as Schedule 8B;
 - iii) better align with relevant statutory requirements;
 - iv) address the discovery of unrecorded sites;
 - v) manage effects on heritage values; and
 - vi) recognise mana whenua's role in managing sites.

218. PC9 does not however undertake a comprehensive review of archaeological and cultural sites within the ODP or throughout Hamilton. The Council advised that sites and areas of significance to Maaori had been “decoupled” from the scope of PC9 and are to be dealt with as part of a stand-alone programme of work.¹³³

219. Given its confined focus (as noted in paragraph 217 above), the Council advised that the following matters would be out of scope:¹³⁴

- a) changes to the scheduling or mapping of existing sites within the ODP which do not relate to ArchSite and/or which are not changed in any way by PC9;
- b) the addition of new archaeological or cultural sites not recorded in ArchSite; and
- c) scheduling and mapping of sites within the Peacocke Precinct (as these were addressed in Plan Change 5 - Peacocke).

220. While some parties disagreed with the changes made and approach taken to ARCS by PC9, no party seriously challenged¹³⁵ the scope of PC9 as outlined by the Council.¹³⁶ We therefore accept and apply that advice to the issues raised by

¹³³ s.42A Report – ARCS and BH, 27 October 2023, section 4.2.3, at p.13.

¹³⁴ Council legal submissions Hearing 2, 1 November 2023, at [72]-[75].

¹³⁵ Other than Cordyline Holdings Ltd (Cordyline) in relation to one discrete aspect which we address below (scope for changes to extent of Site A127).

¹³⁶ While some submitters sought the inclusion of new sites none provided submissions on scope for such inclusions.

submitters for this topic.

221. In terms of issues raised, these ranged from statements of general support for the PC9 framework, to requests for additions, deletions or other site-specific changes; as well as concerns regarding the methodology, accuracy of spatial extent/mapping and appropriateness of provisions.¹³⁷
222. In response to submissions the Council's archaeologist, Mr Nicholas Cable, undertook site visits, and reviewed the significance rankings and plan extents in light of further ground truthing and archaeological information. This work resulted in the Council recommending the following:¹³⁸
 - a) creation of a new information only schedule (Schedule 8CA) for sites deemed destroyed or of low archaeological significance (Group 3);
 - b) movement of sites between the schedules with:
 - i) Schedule 8B sites (Group 1) having the highest significance and greatest level of protection; and
 - ii) Schedule 8C sites (Group 2) requiring a controlled activity consent;
 - c) amendment of the mapped extent of some sites; and
 - d) amendment of the PC9 provisions to reflect the above changes, to ensure a consistent approach, and to ensure assessments of environmental effects address cultural and spiritual values and mana whenua relationships with the sites.
223. There was also a recommendation that mana whenua confirm whether Site A153 should be considered a paa or included within Schedule 8CA.
224. Only three submitters pre-circulated expert evidence in support of their submissions:
 - a) WEL Networks Ltd (WEL) called archaeological evidence from Dr Matthew Campbell, Director of CFG Heritage Ltd, and in-house planning evidence from Sara Brown, a Senior Planner in relation to the exemption they sought to allow maintenance, repair or replacement of existing network utilities within ARCS as a permitted activity;
 - b) Cordyline Holdings Ltd (Cordyline) called planning evidence from Rachel Dimery, Planning Consultant and Director of Dimery Consulting Ltd, seeking changes to the extent of site A127 and the deletion of rules which Ms Dimery considered duplicated requirements under the Heritage Act; and

¹³⁷ s.42A Report – ARCs and BH, section 4.2.

¹³⁸ Council legal submissions Hearing 2, 1 November 2023, at [78]-[80].

- c) Heritage New Zealand Pouhere Taonga (Heritage NZ) called in-house archaeological evidence from Eleanor Sturrock, Archaeologist (for the Lower Northern Area), and in-house planning evidence from Carolyn McAlley, Heritage Planner, who sought a variety of changes to provisions and the identification of unrecorded sites and the introduction of heritage alert layers.

225. A further four submitter groups appeared and gave presentations at the hearing:

- a) Te Kopa King on behalf of Ngaa Uri o Ngaamurikaitaua who was concerned to ensure that Ngaamurikaitaua's connection to the area was recognised and Ngaamurikaitaua were consulted;¹³⁹
- b) Te Haa o te Whenua o Kirikiriroa (THAWK) who wished to ensure there were sufficient protections in the District Plan not just for those sites already identified but for other areas that could be subject to development (or redevelopment);¹⁴⁰
- c) Lynette Williams who appeared as a lay submitter on behalf of WHG and the Waikato Historical Society (WHS),¹⁴¹ in support of the inclusion of NZAA sites, but also seeking the inclusion of additional sites not listed by NZAA and the imposition of an alert layer to identify areas of potential archaeological interest.¹⁴²
- d) Shane and Susan Housley, owners of a property on River Elm, Flagstaff, who were concerned about the Group 1 (Schedule 8B) notation and rule affecting part of their land.¹⁴³

226. A further issue arose some months after a hearing following the filing of a late submission by WEL regarding one of the Council's (post notification) recommendations to expand the extent of archaeological site A112 onto WEL's site at 57 Sandwich Road, St Andrews. While WEL overlooked this at the hearing, we determined in our Direction #23 that it was reasonable to accept WEL's late submission, and to provide a limited opportunity for WEL and the Council to provide further evidence, with the matter then to be determined on the papers.¹⁴⁴

227. WEL's Counsel responded by memorandum dated 22 March 2024 and included a further statement from Dr Matthew Campbell. The short point is that WEL contends that the Sandwich Road substation is an operational facility whose ground has been

¹³⁹ King, Presentation, 9 November 2023.

¹⁴⁰ Bidois, TAWWK Summary statement, 9 November 2023.

¹⁴¹ While Ms Williams had a masters in anthropology (archaeology) and had participated in several archaeological investigations, she was not a practising archaeologist and did not qualify herself in terms of the expert witness code of conduct, instead referring to herself as a lay submitter: Williams, Summary statement, 9 November 2023.

¹⁴² Williams, Summary statement, 9 November 2023.

¹⁴³ Housley, Summary statement, 9 November 2023.

¹⁴⁴ Direction #23, 11 March 2024.

highly modified by foundations, underground cabling, and other utility trenches since establishment in the 1950s and there is no reasonable ground for assuming that any archaeology would have survived. Inclusion in Schedule 8CA would therefore serve no practical archaeological purpose but impose unwarranted consenting and information obligations on WEL.

228. We address each of these issues in the subsections that follow, as well as other mana whenua issues arising. We also briefly address issues raised by other submitters who did not file any evidence or appear at the hearing.

7.2 WEL: Proposed Network Utilities Exemption

229. WEL's initial submission sought the amendment of Policy 19.2.6(g) and the inclusion of a new rule to allow the maintenance, repair, or replacement of existing established network utilities (including associated earthworks) within Group 1 and Group 2 ARCS as a permitted activity. WEL's late submission sought the removal of site A112 from Schedule 8CA (information only Schedule) and from its property in Sandwich Road.

230. WEL provided evidence and submissions in support of their position, the key aspects of which we summarise as follows:¹⁴⁵

- a) a significant portion of WEL's network of lines and cables are located within transport corridors and some are located on private properties;
- b) PC9 includes new archaeological overlays within the transport corridor and private land which contain existing network utility equipment;
- c) such overlays have been applied in a broad-brush manner by simply carrying over sites from ArchSite without those sites being properly evaluated;
- d) there was a need for ground truthing, robust significance assessments, amendments of spatial extents and removal of sites "*destroyed*" by development;
- e) this is particularly because earthworks within the overlay areas will now require a resource consent;
- f) there had been no proper s.32 evaluation of the costs and benefits of imposing such a requirement;
- g) from WEL's perspective such a requirement is unworkable and inefficient and would significantly impact WEL's ability to complete its infrastructure repair, upgrade and maintenance programmes;

¹⁴⁵ Campbell, Statement of evidence, 22 September 2023, at [3.4]-[3.7], [4.8] and [5.13]; Brown, Statement of evidence, 22 September 2023, at [2.5], [4.1]-[4.3], and [5.1]-[6.1]; and WEL legal submissions, 2 November 2023, at [3.1]-[3.11].

- h) the types of excavations proposed by WEL are to enable maintenance in “existing” trenches or foundations are not “new” excavations and will not damage ARCS;
- i) WEL records the co-ordinates of its electricity infrastructure so has a good understanding of exactly where it is located and is able to excavate within the dimensions of its infrastructure and any existing areas of cut and fill;
- j) it is very probable that any archaeology in existing trenches, footings and foundations will have been destroyed and does not pass the Heritage Act test of “reasonable cause to suspect that archaeological sites or features will be present;”
- k) in relation to Site A112 there could be scope issues in increasing the extent, it is a highly modified site, previous utility trenches would have effectively destroyed any surviving archaeological evidence, and there is insufficient evidence and a lack of s.32 assessment in terms of the costs/benefits of inclusion, with costs (in terms of consultation and potential other requirements for WEL) outweighing any perceived benefit;¹⁴⁶ and
- l) the new rule that WEL is seeking is derived from the operative Tauranga City Plan and together with the other changes would ensure the continued safe, secure and efficient supply of electricity to the community.

231. In response, the Council provided evidence and submissions to the effect that:¹⁴⁷

- a) the inclusion of all ArchSites was assessed in the s.32 Report as being the most appropriate method to address the matters raised in PC9;
- b) all sites were evaluated before being assigned to Group 1, 2 or 3;
- c) sufficient assessment has been undertaken for district planning purposes and exploratory trenching on a property-by-property basis would be costly, time consuming and far in excess of what is required;
- d) while WEL’s rule may have been derived from a minor structures and activities rule in the Tauranga City Plan, that rule did not set a precedent for Hamilton, and WEL’s rule was significantly different given it would apply to all existing established ‘network utilities’;
- e) ‘network utility’ was defined broadly in the District Plan and it could not be guaranteed that excavations would be limited to the extent of areas

¹⁴⁶ WEL memo of counsel, 22 March 2024, at [9]-[14]

¹⁴⁷ Council legal submissions – BH, ARCS, HHAs and NPS-IB, 1 November 2023, at [82]; Ryan, Statement of evidence, 1 September 2023, at [109]-[112]; Ryan, Supplementary and rebuttal evidence, 6 October 2023, at [130]- Cable, Statement of evidence, 1 September 2023, Annexure 1, p.3, Cable, Rebuttal statement, 6 October 2023, at [15]-[20], and [23]-[24].

previously cut (when the utilities were installed);

- f) there was potential for earthworks to damage the archaeological or cultural site on which the network utility is located where there are no surface markers to indicate the below ground extent of cut and fill;
- g) mana whenua may not have had a prior opportunity to express their views about any effects on cultural values of establishing and operating the existing network utility on that site;
- h) enabling maintenance of network utilities without requiring engagement with mana whenua would not recognise and provide for their relationship with the landscape;
- i) the permitted activity rule requested by WEL was impractical and unenforceable; and
- j) in relation to site A112, Council relied upon the evidence of Mr Cable – noting¹⁴⁸ that Council proposes that site A112 be classified as an “information only” Group 3 site - which is defined as a site of low archaeological significance because all previously recorded archaeological features have been destroyed by development or investigation, or it is a site with no or unclear archaeological context, such as an artefact findspot or a reported site that has not been substantiated. The advice note to proposed Rule 19.3.3 a) simply recommends consultation with Heritage NZ in the event of permitted activity earthworks or minor works being conducted.

232. Heritage NZ agreed with the Council that the WEL’s proposed new rule should not be incorporated as it was aware of instances where archaeological sites had been affected by the type of activities WEL sought to carry out as permitted activities.¹⁴⁹

233. THAWK also supported Council’s position and sought that consultation with mana whenua and a resource consent be required for such works.¹⁵⁰

234. No other submitters provided evidence on this issue.

7.2.1.1 Discussion and finding

235. Firstly, we acknowledge the important role that network utility infrastructure plays in our communities. We also acknowledge the need for such infrastructure to be maintained, repaired and upgraded from time to time.

236. We are however also cognisant that in making our decision we are required to provide for the relationship of Maaori with their ancestral lands, and the protection

¹⁴⁸ Memorandum of Counsel, 9 April 2024 at [17 – 20].

¹⁴⁹ McAlley, Statement of evidence, 22 September 2023, at [26].

¹⁵⁰ THAWK, Summary statement, 8 November 2023, p.2.

of historic heritage from inappropriate use as matters of national importance.¹⁵¹ In our view, WEL's permitted activity rule is inconsistent with these requirements as it would not enable mana whenua's views to be considered, and nor would it enable an assessment to be made as to whether such uses are inappropriate in historic heritage terms.

237. Further, and while we accept that WEL may be able to locate its below-ground utilities (using pre-recorded co-ordinates) with a high degree of accuracy, WEL was not able to provide co-ordinates or maps which identified the extent of previous cut and fill works around each of its affected utilities or the specific equipment used. Therefore, the extent of the areas previously disturbed by the works is uncertain.
238. In these circumstances, and while we accept that it is unlikely that intact ARCS values remain, the absence of evidence is such that we find it both necessary and appropriate to recognise and provide for the relevant s.6 matters of national importance, and also for the reasons given by Council (summarised at paragraph 231 above). Accordingly, we have not included the relief sought by WEL in our PC9 provisions.

7.3 Cordyline: Site A127 and Claimed Duplication of Functions

239. Cordyline while supporting some aspects of PC9,¹⁵² sought amendments to the extent of Site A127 as well as a change in approach to PC9's proposed management methods for ARCS. In particular, Cordyline sought the removal of consenting requirements and the use instead of an alert layer and accidental discovery protocols.
240. Cordyline considered these changes were within scope and were both necessary and appropriate as:¹⁵³
- a) in terms of scope, Site A127 formed part of PC9 as PC9 proposed changes to its wording;
 - b) the PC9 extent of Site A127 is far greater than that shown in the site inventory;
 - c) there has been no ground truthing of the site nor any post notification assessment review;
 - d) the PC9 approach to managing effects on ARCS is inefficient and duplicates the requirements of the Heritage Act;
 - e) an alert layer, information in the plan about the Heritage Act requirements

¹⁵¹ As noted in ss.6(e) and (f) of the RMA, and as translated into the relevant RMA policy and planning documents.

¹⁵² Such as mapping of ARCS within the ODP, and amendments to Objective 19.2.6 and Policies 19.2.6(a), (b) and (e), as per Dimery, Statement of evidence, 22 September 2023, at [3]-[4].

¹⁵³ Dimery, Statement of evidence, 22 September 2023, at [24]-[36].

and accidental discovery protocols are appropriate and sufficient to meet the requirements under the RMA, with both alert layers and discovery protocols being recognised mechanisms under the WRPS; and

- f) ARCS have blanket protection under the Heritage Act, with any modification or destruction requiring an archaeological authority, and with any failure to comply being an offence.

241. The Council did not agree with the changes sought by Cordyline. Its view was that:¹⁵⁴

- a) there was no scope for changing the extent of Site A127 as:
 - i) the scheduling and mapping of that Site were addressed in the recent Plan Change 5 process and were not reconsidered in PC9;
 - ii) the only changes were to the legal description and general description of the site – the scheduling and mapping remained unaffected;
- b) the purpose of including objectives, policies and rules in the District Plan were different from the purpose of the Heritage Act and so did not duplicate Heritage Act requirements;
- c) the Council was proposing some amendments to provisions (including Policy 19.2.6(a)) to ensure the provisions more clearly reflected the requirements in the RMA;¹⁵⁵
- d) the archaeological technical assessments were robust, and Mr Cable had checked the current condition of recorded ARCS within the scope of his evidence;
- e) even if a site was destroyed or modified it may still have significant cultural values that need to be recognised and provided for; and
- f) the Council had identified sites (in Group 3) that were to be retained in the District Plan for information only purposes.

7.3.1.1 Discussion and finding

242. In terms of Site A127, we were not persuaded by the Council's submissions that there was a lack of scope. The clear purpose of PC9 was to align the archaeological sites with ArchSite and the relief sought by Cordyline would do precisely that. Further, and in the absence of Council having carried out any further assessment of the extent of Site A127, we do not have any evidential basis to impose a different site extent to that shown in ArchSite. Accordingly, we accept the reasons given by

¹⁵⁴ Council legal submissions – BH, ARCS, HHAs and NPS-IB, 1 November 2023, at [83]; Cable Rebuttal statement, 6 October 2023, at [6]; and Ryan Rebuttal evidence, at [190] and [243].

¹⁵⁵ Ryan, Second supplementary statement of evidence, 7 November 2023, at [96]-[106].

Cordyline, and find that the extent of Site A127 should be amended to reflect ArchSite in the maps forming part of PC9 - as shown in Figures 2 and 3 of Ms Dimery's statement of evidence of 22 September 2023.

243. In terms of PC9's approach to ARCS, while we acknowledge that in any particular case consents/approvals may be required under both the RMA and the Heritage Act, that is not unusual and is a product of the different legislative regimes. As the Council notes, the controls are imposed for different purposes, and subject to different tests. We consider the work the Council has undertaken to review and in some cases reclassify the sites, together with the amendment to the rules and introduction of the information only purposes schedule strikes the right balance. It recognises and provides for the s.6 matters of national importance (in particular ss.6(e) and (f)), while still providing a means for appropriate developments affecting ARCS to be considered. Accordingly, we decline this aspect of the relief sought by Cordyline.

7.4 Heritage NZ: Amendments, Proposed Additions, and Alert Layer

244. Heritage NZ filed a submission and further submission seeking amendments to provisions, the identification of unrecorded sites and the introduction of heritage alert layers. Heritage NZ participated in informal without prejudice meetings on archaeological matters¹⁵⁶ and provided in-house planning and archaeological evidence in support of its position.¹⁵⁷
245. In response to issues raised by Heritage NZ (and other submitters)¹⁵⁸, Council:
- a) proposed amendments to:
 - i) policy 19.2.6(g) and the definition of "*minor works*" for consistency and to clarify what works fall within that category;¹⁵⁹
 - ii) rule 19.3.3(f) and the addition of an advice note to make it clear that consultation with Heritage NZ should be undertaken for any earthworks proposed on any Group 3 sites;
 - iii) rule 19.3.3(g) and the advice notes below rule 19.4.2 to clarify the scope of the rule and the intersection with Heritage Act requirements;¹⁶⁰
 - b) confirmed Heritage NZ's acceptance of Council's proposed amendments;¹⁶¹

¹⁵⁶ Heritage NZ Tabled letter for Hearing 2, 3 November 2023.

¹⁵⁷ McAlley, Statement of evidence, 22 September 2023; and Sturrock, Statement of evidence, 22 September 2023.

¹⁵⁸ Such as THAWK and Te Whakakitenga o Waikato Incorporated (Waikato Tainui).

¹⁵⁹ Ryan, Statement of evidence, 1 September 2023, at [114]-[117].

¹⁶⁰ Ryan, Supplementary and rebuttal evidence, 6 October 2023, at [22].

¹⁶¹ Ryan, Supplementary and rebuttal evidence, 6 October 2023, at [8].

- c) agreed further amendments with Heritage NZ to 1.2.2.7 (regarding the information requirements for resource consent applications) and 1.3.3.E1 (to the heritage values and special character assessment criteria) on the basis that these amendments would:¹⁶²
 - i) avoid applicants having to carry out a full archaeological assessment when that is not necessary; and
 - ii) clarify who is responsible for the assessment as well as the content of the assessment.

246. Council however maintained its view that the identification of unrecorded sites and the introduction of heritage alert layers were outside the scope of this plan change.¹⁶³

247. Prior to the hearing, Heritage NZ advised by way of a tabled letter that:

- a) it did not wish to appear as it was generally supportive of the s.42A Report author's updated recommendations; and
- b) it continued to support the without prejudice amendments agreed with Council to 1.2.2.7 of Appendix 1.2 – Information Requirements¹⁶⁴ to clarify when an archaeological assessment was required, the requirements of such assessments, and the information that must be included where a site has identified tangata whenua cultural or spiritual values.

7.4.1.1 Discussion and finding

248. We accept the amendments that Council has made in response to Heritage NZ's submission, for the reasons provided by the Council (as summarised at paragraph 245 above).

249. In terms of the identification of unrecorded sites, while we acknowledge the potential for such sites to exist, we do not consider it is either possible, appropriate or necessary to expand PC9 to include such sites. This is because:

- a) we have no information about the extent, location, cultural and historical values or present state of such sites;
- b) potentially affected parties had not been identified let alone given a reasonable opportunity to participate; and
- c) unrecorded sites already have a form of protection under the Heritage Act.

250. Similarly, and while we acknowledge that a heritage alert layer may put parties on notice about potential ARCS, the bounds of such a layer and its impacts did not

¹⁶² Ryan, Second supplementary statement of evidence, 7 November 2023, at [24]-[26].

¹⁶³ Council legal submissions – Hearing 2, 1 November 2023, at [84].

¹⁶⁴ As contained in Appendix 3 of PC9.

form part of the assessment for PC9 and nor was any evidence presented that identified those aspects or its proposed provisions. We therefore decline to include those aspects in PC9.

7.5 King: Ngaamurikaitaua (and Others)

251. Te Kopa King filed a submission on behalf of Manga Waitawhiriwhiri Kaitiaki (#399). Mr King was concerned that consultation was not being undertaken with the correct tangata whenua groups before work was carried out on ARCS and in restoration projects; and that ARCS had been modified or destroyed without a Heritage NZ authority. Mr King sought amendments to provisions to provide for prior consultation and engagement with all relevant tangata whenua groups (including Ngaamurikaitaua).
252. The Council in its s.42A Report acknowledged the issue of representation but indicated that it was unable to be supported because it was beyond the scope of the plan change.¹⁶⁵ This view was echoed in the Council's legal submissions where it was stated that all of the concerns raised by Mr King (consultation, past destruction of ARCS, Heritage NZ processes and restoration projects) were beyond scope.
253. Mr King appeared at the hearing, and while he provided further information about the connections of Ngaamurikaitaua (and other groups) to the broader Hamilton area, he did not directly address the issue of scope for his requests.

7.5.1.1 Discussion and finding

254. We acknowledge the concerns raised by Mr King. However, these are not matters we are charged with determining under PC9.
255. From a process point of view, the Council's s.32 Report confirmed compliance with the Schedule 1 RMA requirement to consult with the relevant "iwi authorities".¹⁶⁶ The material provided by Mr King while outlining connections did not provide sufficient detail to qualify Ngaamurikaitaua (or the other groups mentioned) as iwi authorities (as that term is used in the RMA).¹⁶⁷ In any event, Council's pre-notification consultation decisions are not matters that we have jurisdiction to determine.¹⁶⁸
256. Similarly, we have no jurisdiction to review the legality (or otherwise) of previous works on archaeological sites, or of current or proposed future works - that jurisdiction lying primarily with Heritage NZ.¹⁶⁹

¹⁶⁵ s.42A Report – ARCS and BH, 27 October 2023, section 4.2.3, p.13.

¹⁶⁶ s.32 Evaluation Report, 22 June 2022, p.3 and Appendix 4.

¹⁶⁷ Refer RMA, s.2.

¹⁶⁸ That jurisdiction lying instead with the High Court where an application for judicial review is brought.

¹⁶⁹ Noting that the Council will also have a role to the extent provided for under the District Plan.

257. However, we note that the PC9 ARCS provisions as recommended by the Council (and which we have largely adopted), include provisions providing for mana whenua input. This input is not limited to named mana whenua groups but extends to all groups who are able to qualify themselves as such in relation to a particular area.¹⁷⁰
258. Accordingly, we have not made any changes to the provisions in response to Mr King's submissions.

7.6 THAWK: Protection of Existing and Unidentified Sites

259. THAWK in its submission (#426) sought that Council develop new maps showing the location and extent of sites of significance based on Maaori values and that those maps be included in the next District Plan review. Council confirmed that this would form part of the future sites and areas of significance to Maaori workstream.
260. THAWK's submission also sought that a new rule be included requiring consultation with mana whenua where development or earthworks is proposed within 100m of an identified cultural site. By the time THAWK representatives appeared at the hearing, the relief sought had been refined to:
- a) requiring consultation with mana whenua and a resource consent where developments were proposed that would affect a listed archaeological or cultural site, or would occur within 150m of a such a site; and
 - b) for any development which falls outside the areas covered by (a), and which involve earthworks deeper than 20cm, requiring a mana whenua monitor to oversee the earthworks and the carrying out of any appropriate cultural protocols.
261. THAWK submitted that such changes were necessary given:
- a) the listed sites to date focused on European not cultural sites;
 - b) where protection was provided it was often only a portion of the cultural site;
 - c) cultural sites are continually being developed and destroyed; and
 - d) it was not possible to identify all areas in advance meaning unlisted areas may slip through the net.
262. The Council submitted that this relief also fell within the scope of the proposed future programme of work for sites and areas of significance for Maaori, and therefore was outside the scope of PC9.¹⁷¹

¹⁷⁰ For example refer to Rule 19.4.2(b).

¹⁷¹ Ryan, Supplementary and rebuttal evidence, 6 October 2023, at [84]; and Council legal submissions – BH, ARCS, HHAs and NPS-IB, 1 November 2023, at [75].

7.6.1.1 Discussion and finding

263. We accept that PC9 as notified has a narrow scope as far as sites and areas of significance to Maaori are concerned, and that most of the relief sought by THAWK is beyond scope. This is because PC9 only affects sites of significance to Maaori if they are existing listed archaeological sites and changes are required to better align with ArchSite. Identification of additional culturally significant sites and the appropriate controls to apply to those sites, is therefore a matter for a future process. We understand from the Council's submissions that a significant amount of preparatory work had been done prior to the notification of PC9, and we would encourage the Council to continue to progress this workstream as a matter of priority.
264. In the meantime, we note that the changes the Council has proposed in response to other submissions will provide a measure of relief for THAWK (and other mana whenua submitter). These changes include:¹⁷²
- a) broadening policy 19.2.6(f) and the definitions of Group 1, Group 2 and Group 3 sites, so that they apply to cultural sites (even if they are not archaeological sites);
 - b) expanding the explanation to policy 19.2.6(f) to provide more guidance about how destroyed or damaged sites could still be recognised through signage, pou, art, interpretation panels, story boards, building design and decoration, landscape design, planting and naming;
 - c) clarifying the information requirements in 1.2.2.7 for resource consents affecting different categories of ARCS including requiring an application to include reference to any advice received from relevant iwi/mana whenua on the effects of the activity, measures proposed to address those effects and the responses of iwi/mana whenua to those measures; and
 - d) amendment to Appendix 1.3.2.E(b) to make it clear that the matter of control providing for mana whenua representation on site for monitoring is relevant when requested by mana whenua.

7.7 WHG/WHS: Proposed Additions and Alert Layer

265. WHG/WHS supported the inclusion of NZAA sites listed on ArchSite but sought that PC9 also include sites known but not listed by NZAA¹⁷³ as well as 20th Century sites and an alert layer to identify areas of potential archaeological interest.

¹⁷² Ryan, Second supplementary statement of evidence, 7 November 2023, at [42], [48], [68], [73], and [78].

¹⁷³ This request for additional sites was also sought by Catherine Smart (#427) and to a limited extent by the Council (#201).

266. Ms Williams, who presented evidence in support of WHG/WHS's submissions, stated that these amendments were appropriate as:¹⁷⁴

- a) 20th Century sites can be classed as ARCS if declared as such under s.43 of the Heritage Act;
- b) sites that are unique and highly significant to the history and development of Hamilton need to be protected even though they relate to the 20th Century;
- c) PC9 has omitted three recorded ARCS or aspects of them (Frankton Drain from S14/498, Beale Cottage land and well from S14/159, and the site of Lake House from S14/223) which should be included;
- d) relying on NZAA Site records was insufficient in terms of protecting Hamilton's heritage and other known sites needed to be evaluated and included; and
- e) an alert layer was needed now for the central and commercial districts and did not need to await a further plan change as it can sit beside the District Plan and be utilised by the Council in the meantime.

267. The Council's position was that:¹⁷⁵

- a) 20th Century sites are not archaeological sites unless declared as such under s.43 of the Heritage Act, so while the definition of Archaeological Site in the Plan should be amended to better reflect the definition in the Heritage Act, there were no current s.43 sites requiring inclusion;
- b) Site S14/498 associated with Frankton Railway Station had been subject to a post notification review by Mr Cable and recommended for inclusion to align with ArchSite, an opportunity had been given for landowners affected by the proposed change, but no submissions had been received;
- c) sites going beyond ArchSite were beyond the scope of PC9; and
- d) the requested alert layer was similarly beyond the scope of PC9 as it would include sites not recorded in ArchSite, and accordingly any such change would need to be progressed outside of the PC9 process.

268. No direct response was provided by the Council in relation to the requests to include Beale Cottage land and well (S14/159) and the site of Lake House (S14/223).

7.7.1.1 Discussion and finding

269. We accept that in relation to ARCS the purpose of PC9 was to provide better alignment with ArchSite.

¹⁷⁴ Williams, Summary statement, 9 November 2023.

¹⁷⁵ Council legal submissions Hearing 2, 1 November 2023, at [84] and [85]; Ryan Rebuttal evidence, 6 October 2023, at [89]-[91]; s.42A Report – ARCS and BH, 27 October 2023, sections 4.2.5 and 4.2.9, pp.18 and 27 respectively; and at and oral statements in response to questions at the hearing.

270. In terms of the Frankton Railway Station Site S14/498 we accept the Council's advice that it is appropriate to include this site and note that an opportunity was given to affected parties to submit on its inclusion. In terms of the other two sites (Beale Cottage and Lake House), these have not been subject to a post notification review and evaluation by the Council (or by the submitter) and nor have any potentially affected landowners been given the opportunity to submit. Accordingly, we have insufficient evidence to be satisfied that there is scope or that it is appropriate to include these sites at this stage.
271. In terms of ARCS not currently recorded in ArchSite, while we acknowledge the potential for such sites to exist, we do not consider it is possible or appropriate to expand PC9 to include such sites. This is because such sites have not been fully identified or evaluated, and nor have potentially affected parties been given a reasonable opportunity to participate. Similarly, and while we acknowledge that an alert layer may put parties on notice about potential ARCS, the bounds of such a layer and its impacts did not form part of the assessment for PC9 and nor was any evidence presented that identified those aspects. We therefore agree with the Council that it is more appropriate that the requests for additional sites and an alert layer be considered through a separate process.

7.8 Housley: Site A12 and Clarification of Rule

272. Mr and Mrs Housley sought two changes to PC9 in their submission.¹⁷⁶

- a) The first was the reclassification of Site A12 (Te Oowhanga Paa) as it affected their property, from a Group 1 to a Group 3 (information purposes only) site. This was on the basis that:
 - i) they had not had a proper chance to object when the site was classified as a Group 1 ARCS in 2012 and had been advised by the Council to raise it at the next district plan review;
 - ii) a protective covenant would remain in place across their property to protect the remaining shallow ditch;
 - iii) a significant portion of Te Oowhanga Paa has already been protected as reserve; and
 - iv) there had been significant human modification and ground disturbance to the site.
- b) The second was that Rule 19.4.2(b) be amended to provide further clarification/direction of "adverse effects". The Housley's were concerned that the Council's wording would give mana whenua the potential to deny all future alterations and improvements to Group 1 and Group 2 sites.

¹⁷⁶ Housley Summary statement, undated, but presented on 9 November 2023.

273. Te Whakakitenga o Waikato Incorporated (Waikato Tainui) opposed Mr and Mrs Housley's proposed changes to the rule in its further submission (on the basis it was clear the recommendations must relate to the assessment of environment effects for the specific proposal) but did not specifically comment on Site A12.¹⁷⁷

274. The Council's view was that:¹⁷⁸

- a) there was no scope to reclassify A12 as PC9 proposed no change to that site; and
- b) rule 19.4.2(b) should be amended to clarify that any avoidance, remedial or mitigation measures must correspond with the scale and significance of the effects of the proposal.

7.8.1.1 Discussion and finding

275. We acknowledge Mr and Mrs Housley's concerns in relation to Site A12. However, we have no jurisdiction to review the process by which Site A12 came to be listed in the ODP in 2012. Nor do we have scope to review the extent of that Site through PC9 since PC9 proposed no changes to that Site. PC9 is not a full district plan review, instead being focused on specific areas, which in the case of ARCS is to achieve better alignment with ArchSite. We were provided with no evidence that the Group 1 categorisation of Site A12 was out of alignment with ArchSite. Nor were we provided with any expert evaluation that the values of the Site have been modified or destroyed since it was listed. Given the directive in s.6(f) of the RMA, we therefore have no basis on which to amend the listing even if there was scope.

276. In terms of the rule, we are satisfied that the changes the Council has proposed to the rule are sufficient to clarify the obligations, the wording is consistent with RMA usage, and that further changes are not warranted.

7.9 Other Mana Whenua Issues

277. In addition to the issues already addressed above, other issues were raised by mana whenua groups at the hearing. These included:

- a) Waikato Tainui's request for a change of activity status for earthworks on Group 2 sites;
- b) Ngaati Wairere's requests for a review of archaeological site extents, additional sites, additional controls, naming changes and building restrictions.

¹⁷⁷ Waikato Tainui Further Submission, 18 November 2022, Appendix 1, Table, Row 6.

¹⁷⁸ Council legal submissions – Hearing 2, 1 November 2023, at [85(c)]; Cable Statement of evidence, 1 September 2023, Appendix 1, p.3; and s.42A Report – ARCS and BH, section 4.2.4, p.15.

7.9.1 Waikato Tainui activity status request

278. Waikato Tainui (#349) sought that earthworks on all schedule 8C sites (whether Group 1 or Group 2) be a restricted discretionary activity rather than a controlled activity. Waikato Tainui submitted that this was because controlled activity status (which is proposed to apply to Group 2 sites) is not adequate protection from damage by earthworks.
279. The s.42A Report author disagreed and expressed the view that a restricted discretionary activity status would impose an unnecessary level of control on Group 2 sites, which lack high or outstanding archaeological values.
280. However, Mr Ryan for the Council took a different view:¹⁷⁹
- a) he acknowledged that (other than the Waikato Tainui submission point) cultural advice had yet to be received regarding the appropriate activity status for earthworks on cultural sites;
 - b) he expected this would be addressed as part of the future workstream on sites and areas of significance to Maaori;
 - c) that based on Ngaati Wairere's recent opposition to disturbance of earthworks on urupaa he recommended that earthworks on urupaa be a restricted discretionary rather than controlled activity; and
 - d) this could be achieved by amendments to rules 19.3.3, 19.5 and 19.6.
281. At the hearing we explored this issue further with both Mr Ryan and Mr Cable and queried whether a restricted discretionary activity status should apply to all cultural sites until the future workstream on sites of significance to Maaori had been completed. Mr Cable indicated he would support that from an archaeological perspective; however Mr Ryan did not consider that was necessary from a planning perspective.

7.9.1.1 Discussion and finding

282. In considering this issue we are cognisant that recognising and providing for sites of significance to Maaori is a matter of national importance under s.6(e) of the RMA.
283. We accept that cultural sites have been destroyed or damaged as a result of past developments. We acknowledge that Council is currently working on a future process to identify, understand the cultural values of, and provide for such sites. However, in the meantime, and as a result of the Council's decision to separate that workstream from PC9, the absence of this information means that if a controlled activity status were applied to cultural sites within Group 2, the Council would have

¹⁷⁹ Ryan, Second supplementary statement of evidence, 7 November 2023, at [16]-[21].

no choice but to grant the consent, irrespective of the cultural significance of the site. We do not consider this to be a satisfactory outcome.

284. Accordingly, we have determined that it is more appropriate that any earthworks affecting a Group 2 Maaori cultural site (whether an urupaa or other site listed for its Maaori cultural values) should require consent as a restricted discretionary activity. This will enable the Council to refuse a consent application should that be warranted in a particular case.
285. We consider this can be achieved via the same method proposed by Mr Ryan (the asterisking of cultural sites within Schedule 8C and reference to the asterisked sites in rules 19.3.3, 19.5 and 19.6). For clarity, this would apply to all Group 2 sites listed for their Maaori cultural values including paa, borrow pits, landing places, Maaori horticulture etc. This would also include Site A153 which the Council has flagged as needing mana whenua feedback as to its categorisation as a paa site or a site to be included in Schedule 8CA.
286. In reaching this determination we are also cognisant that there will be an opportunity for review and further assessment of the cultural values of such sites through the Council's proposed cultural workstream process. If following such an assessment a particular site is found not to warrant protection via a restricted discretionary activity status, then amendments can be made at that time. We therefore continue to encourage the Council to progress that workstream as a matter of priority.

7.9.2 Ngaati Wairere: Review of site extents, additional sites and controls

287. Ngaati Wairere (#169) sought that:

- a) the extents of all archaeological sites be informed by a commissioner well-versed in tikanga and a Maaori Land Court Judge;
- b) additional landmark and river features be added;
- c) additional controls for sub-soils associated with pre-1950 houses and structures;
- d) sites be referred to as sites of hapuu and archaeological significance; and
- e) no high rises be permitted by paa sites.

288. The s.42A Report author indicated that:

- a) a post notification review of the extents of the PC9 archaeological sites had been completed by an archaeological professional, and that a further review would occur as part of the sites of significance to Maaori workstream;¹⁸⁰

¹⁸⁰ s.42A Report – ARCS and BH, 27 October 2023, section 4.2.3, at p.13.

- b) the request for additional sites would be similarly addressed through that separate workstream;¹⁸¹
- c) the request for controls on pre-1950 houses and structures were beyond the scope of PC9 since ARCS are by definition limited to pre-1900 sites.¹⁸²

289. Mr Ryan in his evidence responded to the balance of these issues as follows:¹⁸³

- a) he preferred the term 'cultural site' as it included sites of significance to both mana whenua and tangata Tiriti; and
- b) the effect of restricting building heights near the 34 recorded paa in Hamilton needed careful assessment which had not yet been undertaken but which should be considered through the separate workstream.

7.9.2.1 Discussion and findings

290. We agree with the Council that any remaining concerns regarding the extent of existing sites, the inclusion of additional, culturally significant sites, or the restriction of multi storey buildings beside paa can be addressed through that further workstream. We accept the reason the Council has given for the use of the term 'cultural site' and confirm that we agree there is no scope within PC9 to impose controls on sub-soils associated with pre-1950 houses and structures.

7.10 Other Submitter Issues

- 291. There were also a significant number of issues raised by other submitters who did not file evidence or appear at the hearing.¹⁸⁴ These matters were summarised and responded to in the s.42A Report and through the Council's evidence.¹⁸⁵
- 292. While some of the issues raised by these submitters overlapped with the issues raised by the submitters we have addressed in earlier sections (such as requests for separate plan change processes), the submissions also raised different issues (such as requests for deletion of other specific sites, further consultation, evaluation and production/review of other reports, etc).

¹⁸¹ s.42A Report – ARCS and BH, 27 October 2023, section 4.2.5, at p.18.

¹⁸² s.42A Report – ARCS and BH, 27 October 2023, section 4.2.9, at p.27.

¹⁸³ Ryan, Supplementary and rebuttal evidence, 6 October 2023, at [41]-[46] and [50]-53].

¹⁸⁴ These included submissions by: the Property Council NZ (#388), Raymond Mudford (#98), Kathleen McCaughtrie (#407), Steven Perdia (#392), Ruakura Motors (#20 and #118), PFS Investments Ltd (#205), Keith Houston (#405), ECS Group (#36), Ian McLeod (#41), Matt Stark and Clyde Bunker (#43), Matt Stark – Panama House (#45), The Riverbanks (#48), Abby Van De Ven (#86), Korris Ltd (#402), Helen Nielsen (#126), JR Mara (#156), Stephen Gale (#308), Palaone Enterprises Ltd (#311), Jacqueline Bates (#362), Waka Kotahi (#366), Jamie and Kieran Lomas (#367), Ben and Mary van den Engel (#432), Made of Hamilton (#437), Douglas Rattray (#442), Kāinga Ora (#428), Z Energy (#422), Adare Company (#423), Blue Wallace Ltd (#347), The Wise Charitable Trust (#401), Fonterra Ltd (#135), Gordon and Rita Chesterman (#182), Peter Skilton (#418).

¹⁸⁵ s.42A Report – ARCS and BH, 27 October 2023, section 4; and various statements of evidence from Paul Ryan and Nicholas Cable.

7.10.1.1 Discussion and finding

293. To the extent the issues raised by other submitters overlap with the relief sought by the submitters we have specifically addressed above, we make the same findings for the reasons given in those sections.
294. For all of the other issues raised, in the absence of any evidence to the contrary we have no basis to disagree with the conclusions reached by the Council. We therefore accept and agree with the Council's position on those matters (from both a scope and merit perspective) as summarised in the s.42A Report¹⁸⁶ and Council evidence.

8 Statutory Assessment

295. The RMA sets out a range of matters that must be addressed when considering a plan change. These matters have been identified, correctly in our view, in both the s.32 ER and the relevant s.42A Reports and Addenda. A summary of those requirements is attached as **Appendix 3**. We note that PC9 was considered to satisfy those requirements.
296. We also note that s.32 clarifies that the analysis of efficiency and effectiveness is to be at a level of detail that corresponds to the scale and significance of the effects that are anticipated from the implementation of the proposal.
297. Having considered the evidence, submissions, legal advice, and relevant background documents, we are satisfied that, overall, those aspects of PC9 with which this decision concerns itself have been developed in accordance with the relevant statutory and policy matters required by the RMA and that fall within the Council's s.31 functions.

9 Decision

298. Per clause 10 of Schedule 1 RMA, and having considered the submissions, evidence and reasons before us, we make the following decision:
- a) The Notable Tree, Significant Natural Area, and Archaeological and Cultural Sites provisions of PC9 are approved as set out in **Appendices 4 and 5** and this decision; and
 - b) Submissions are accepted, accepted in part, or rejected consistent with our decision.
299. In summary, the reasons for the decision are that PC9:

¹⁸⁶ s.42A Report – ARCS and BH, 27 October 2023, at pp.10-28; Ryan, Second supplementary statement of evidence, 7 November 2023, at pp.9-10, and 24-26; Ryan, Supplementary and rebuttal evidence, 6 October 2023, at [32]-[40], [54]-[57], [60]-[62], [65]-[79], [92]-[94]; Ryan, Statement of evidence, at [67]-[240]; and Cable, Statement of evidence, 1 September 2023, at Annexures 1, 2 and 3.

- a) will assist the Council in achieving the purpose of the RMA;
- b) is consistent with the provisions of Part 2 of the RMA;
- c) will give effect to all relevant higher order RMA policies and plans;
- d) is supported by the necessary evaluation in accordance with s.32;
- e) accords with s.18A of the RMA; and
- f) will better assist the effective implementation of the Hamilton City Plan.



David Hill
Chairperson
Hearing Panel

29 April 2024

and on behalf of Commissioners Vicki Morrison-Shaw, Dave Serjeant and Councillor Ewan Wilson.

Appendix 1 – Glossary of Terms

APP5 means Appendix 5 to the WRPS.

ARCS means Archaeological and Cultural Sites.

BH means Built Heritage.

Cordyline means Cordyline Holdings Ltd.

Council means Hamilton City Council.

cSNA means a corridor/indigenous fauna habitat SNA.

DGC means the Director-General of Conservation.

DOC means the Department of Conservation.

fSNA means a floristic SNA.

Hearing 1 means the hearing for HHAs, SNAs and NTs held over nine days from 22 May 2023 to 2 June 2023.

Hearing 2 means the hearing held between 6-15 November 2023 regarding the historic heritage assessment methodology for BH and HHAs, other remaining matters relating to AS NPS-IB.

Heritage Act means Heritage New Zealand Pouhere Taonga Act 2014.

Heritage NZ means Heritage New Zealand Pouhere Taonga.

HHAs means Historic Heritage Areas.

JWS means Joint Witness Statement arising from expert conferencing.

NPS-IB means the National Policy Statement for Indigenous Biodiversity 2023.

NTs means Notable Trees.

NZAA means the New Zealand Archaeological Association.

ODP means the operative Hamilton City District Plan.

PC9 means Plan Change 9 – Historic Heritage and Natural Environment to the Hamilton City District Plan.

PRZ means the Protected Root Zone as introduced by PC9.

RNZIH means the Royal New Zealand Institute of Horticulture.

RPZ means the Root Protection Zone in the ODP.

SNAs means Significant Natural Areas.

STEM means the standard tree evaluation method.

TAL means Te Awa Lakes Unincorporated Joint Venture, Perry Group, and Horotiu Farms Ltd.

THAWK means Te Haa o te Whenua o Kirikiriroa.

Waikato Tainui means Te Whakakitenga o Waikato Incorporated.

WEL means WEL Networks Ltd.

WHG means the Waikato Heritage Group.

WHS means the Waikato Historical Society.

WRPS means the Waikato Regional Policy Statement.

Appendix 2 – List of Appearances

Party	Persons Appearing	Role
Council	Lachlan Muldowney	Legal Counsel
	Nicholas Cable	Archaeologist
	Paul Ryan	Planner
	Andrew McFarlane	Planner
Manga Waitawhiriwhiri Kaitiaki	Te Kopa King	Spokesperson
	Ron McKinnon	Koroua
Te Haa o te Whenua o Kirikiriroa	Rawiri Bidois with Rangiua Riki Atutahi Riki Raiha Gray T Matangi Piripi Matika Mape Matika Harry Wilson Derek Burns Menzies Bradley	Manager of THAWK
The Adare Company	Ben Inger	Planner
WHG/WHs	Lynette Williams	Historian
Housley	Shane and Susan	Property owners
WEL Energy	Sara Brown	Planner
	Matthew Campbell	Archaeologist
Cordyline	Rachel Dimery	Planner

Appendix 3 – Summary of Plan Change Requirements

A. General requirements - district plan (change)

1. A district plan (change) should be designed to accord with³⁷ — and assist the territorial authority to carry out — its functions³⁸ so as to achieve the purpose of the Act³⁹.
2. The district plan (change) must also be prepared in accordance with any national policy statement, New Zealand Coastal Policy Statement, a national planning standard,⁴⁰ regulation (there are none at present)⁴¹ and any direction given by the Minister for the Environment⁴².
3. When preparing its district plan (change) the territorial authority must give effect to⁴³ any national policy statement, New Zealand Coastal Policy Statement, and national planning standard.⁴⁴
4. When preparing its district plan (change) the territorial authority shall:
 - (a) have regard to any proposed regional policy statement (change),⁴⁵
 - (b) give effect to any operative regional policy statement.⁴⁶
5. In relation to regional plans:
 - (a) the district plan (change) must not be inconsistent with an operative regional plan for any matter specified in section 30(1) or a water conservation order,⁴⁷ and
 - (b) the district plan (change) must have regard to any proposed regional plan (change) on any matter of regional significance etc.⁴⁸
6. When preparing its district plan (change) the territorial authority must also:
 - have regard to any relevant management plans and strategies under other Acts, and to any relevant entry

³⁷ RMA, section 74(1).

³⁸ As described in section 31 of the RMA.

³⁹ RMA, sections 72 and 74(1).

⁴⁰ RMA, section 74(1)(ea).

⁴¹ RMA, section 74(1).

⁴² RMA, sections 74(1)(c) and 80L.

⁴³ RMA, section 75(3).

⁴⁴ The reference to "any regional policy statement" in the Rosehip list here has been deleted since it is included in (4) below which is a more logical place for it.

⁴⁵ RMA, section 74(2)(a)(i).

⁴⁶ RMA, section 75(3)(c).

⁴⁷ RMA, section 75(4).

⁴⁸ RMA, section 74(2)(a)(ii).

in the New Zealand Heritage List/Rārangī Kōrero and to various fisheries regulations and to any relevant project area and project objectives (if section 98 of the Urban Development Act 2020 applies)⁴⁹ to the extent that their content has a bearing on resource management issues of the district; and to consistency with plans and proposed plans of adjacent territorial authorities⁵⁰ and to any emissions reduction plan and any national adaptation plan made under the Climate Change Response Act 2002⁵¹;

- take into account any relevant planning document recognised by an iwi authority;⁵² and
- not have regard to trade competition or the effects of trade competition.⁵³

7. The formal requirement that a district plan (change) must⁵⁴ also state its objectives, policies and the rules (if any) and may⁵⁵ state other matters.

B. Objectives [the section 32 test for objectives]

8. Examine the extent to which the objectives of the proposal being evaluated are the most appropriate way to achieve the purpose of the Act.⁵⁶

C. Policies and methods (including rules) [the section 32 test for policies and rules]

9. The policies are to implement the objectives, and the rules (if any) are to implement the policies;⁵⁷
10. Whether the provisions (the policies, rules or other methods) are the most appropriate way to achieve the purpose of the district plan change and the objectives of the district plan by:⁵⁸
 - (a) identifying other reasonably practicable options for achieving the objectives;⁵⁹ and
 - (b) assessing the efficiency and effectiveness of the provisions in achieving the objectives, including by:⁶⁰

⁴⁹ RMA, section 74(2)(b).

⁵⁰ RMA, section 74(2)(c).

⁵¹ RMA, section 74(2)(d) and (e).

⁵² RMA, section 74(2A).

⁵³ RMA, section 74(3).

⁵⁴ RMA, section 75(1).

⁵⁵ RMA, section 75(2).

⁵⁶ RMA, section 74(1) and section 32(1)(a).

⁵⁷ RMA, section 75(1)(b) and (c).

⁵⁸ See summary of tests under section 32 of the RMA for 'provisions' in *Middle Hill Limited v Auckland Council Decision* [2022] NZEnvC 162 at [30].

⁵⁹ RMA, section 32(1)(b)(i).

⁶⁰ RMA, section 32(1)(b)(ii).

- i. identifying and assessing the benefits and costs of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the provisions, including the opportunities for:
 - economic growth that are anticipated to be provided or reduced;⁶¹ and
 - employment that are anticipated to be provided or reduced;⁶²
- ii. if practicable, quantifying the benefits and costs;⁶³ and
- iii. assessing the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the provisions;⁶⁴
 - Summarising the reasons for deciding on the provisions;⁶⁵
 - If a national environmental standard applies and the proposed rule imposes a greater prohibition or restriction than that, then whether that greater prohibition or restriction is justified in the circumstances.⁶⁶

D. Rules

11. In making a rule the territorial authority must have regard to the actual or potential effect of activities on the environment.⁶⁷
12. Rules have the force of regulations.⁶⁸
13. Rules may be made for the protection of property from the effects of surface water, and these may be more restrictive⁶⁹ than those under the Building Act 2004.
14. There are special provisions for rules about contaminated land.⁷⁰
15. There must be no blanket rules about felling of trees⁷¹ in any urban environment.⁷²

E. Other statutes:

⁶¹ RMA, section 32(2)(a)(i).

⁶² RMA, section 32(2)(a)(ii).

⁶³ RMA, section 32(2)(b).

⁶⁴ RMA, section 32(2)(c).

⁶⁵ RMA, section 32(1)(b)(iii).

⁶⁶ RMA, section 32(4).

⁶⁷ RMA, section 76(3).

⁶⁸ RMA, section 76(2).

⁶⁹ RMA, section 76(2A).

⁷⁰ RMA, section 76(5).

⁷¹ RMA, section 76(4A).

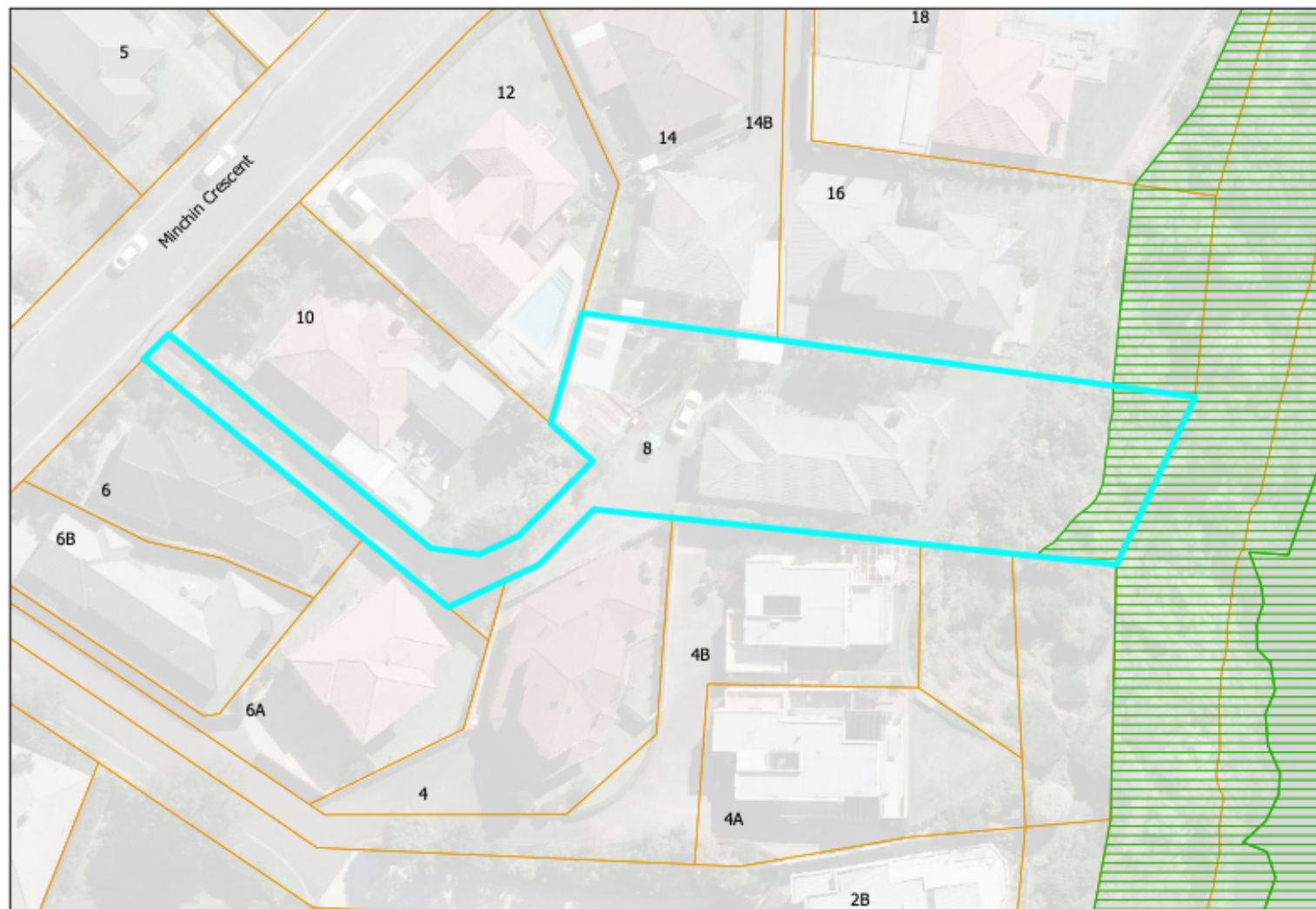
⁷² RMA, section 76(4B).

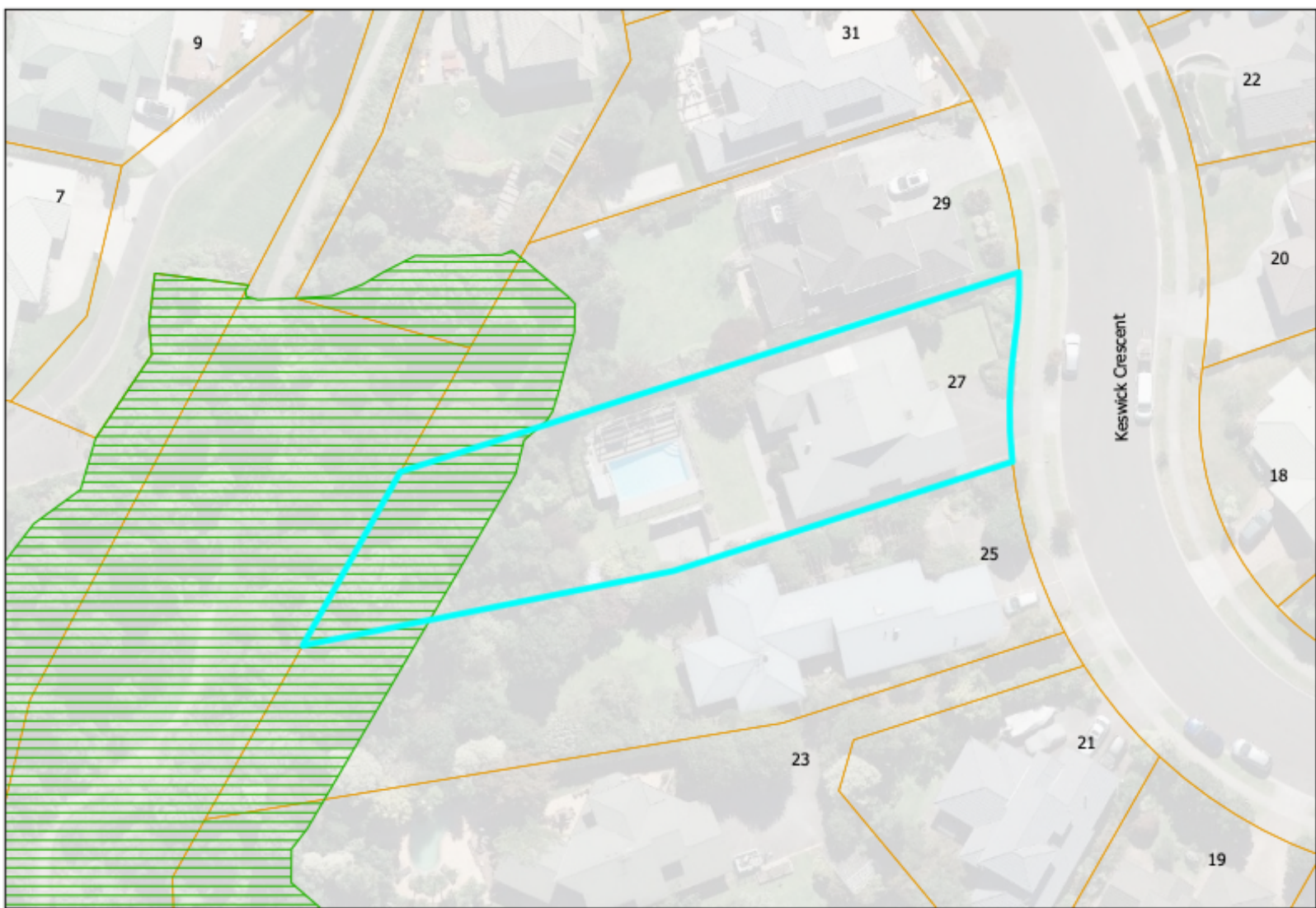
16. Finally territorial authorities may be required to comply with other statutes (which within the Waikato Region includes the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010).

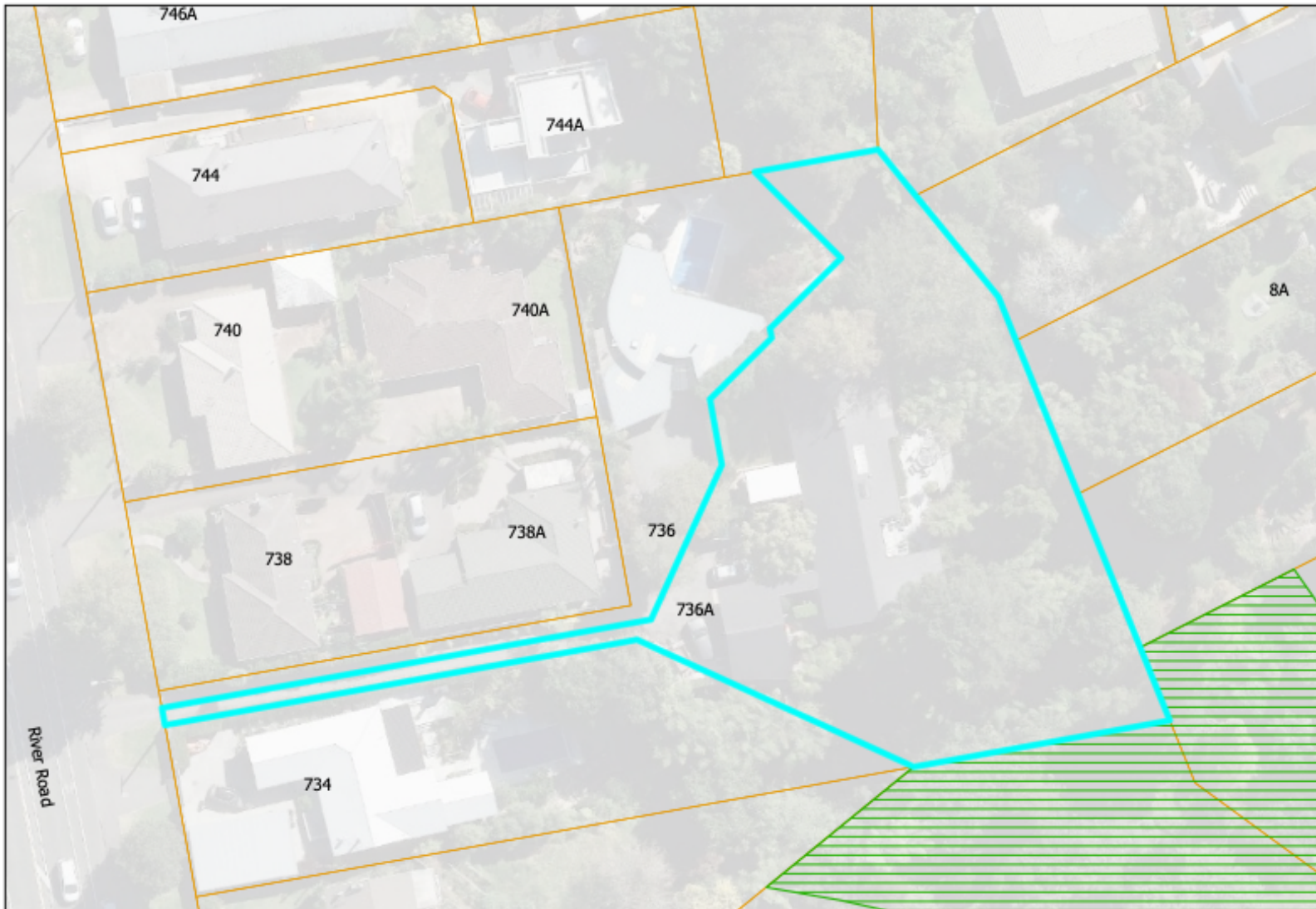
Appendix 4 – Amended SNA Maps

As noted at paragraph 130 of our decision, in addition to the final SNA maps proposed by Mr Dean, the following:

1. 8 Minchin Crescent
2. 27 Keswick Crescent
3. 736a River Road







Appendix 5 – PC 9 Provisions